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ABSTRACT

This study represents an attempt to discern what responsibility the State should assume for regulating the education of the young, and what is the most defensible approach to fulfilling that responsibility. Analyses of this type could be timely, especially in the light of the spreading "alternative schools" movement; growing recognition among scholars that most educational experimentation remains discouragingly close to conventional practices despite dramatic differences in the educational needs of children; concern that cultural pluralism is declining in a society bombarded by electronic mass media; new attacks on compulsory school attendance laws and other time-honored mechanisms of educational regulation; and at least inchoate recognition that the nation's courts have not yet adequately balanced the interests of the State against the liberties that students, parents, and teachers seek to exercise in educational settings. These considerations are discussed and documented. The most pervasive and liberty-endangering regulatory approach used by State governments is the programmatic approach--the method of prescribing the programs, methods, or procedures by which children must be reared during the extensive periods when school attendance is compulsory. Little attention has been given to other ways of fulfilling government's regulatory responsibility in education. (Author/JF)

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SUPER - PARENT

AN ANALYSIS OF STATE EDUCATIONAL CONTROLS

by

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CHAPTER 1

THE NATURE AND CONTEXT OF EXISTING CONTROLS

The present study is an attempt to discern what responsibility the state should assume for regulating the education of the young, and what is the most defensible approach to fulfilling that responsibility. Analyses of this type may be timely, especially in the light of the spreading "alternative schools" movement (which frequently runs afoul of government); growing recognition among scholars that most educational experimentation remains discouragingly close to conventional practices (partly because of legal constraints), despite dramatic differences in the educational needs of children; concern that cultural pluralism (which a more heterogeneous amalgam of schools might help maintain) is declining in a society bombarded by electronic mass media; new attacks upon compulsory school attendance laws and other time-honored mechanisms of educational regulation; and at least inchoate recognition that the nation's courts have not yet adequately balanced the interests of the state against the liberties students, parents, and teachers seek to exercise in educational settings. These considerations are discussed and documented in the pages that follow.

The work reported here was funded by the Continental Illinois National Bank Foundation and sponsored by the Illinois Advisory Committee on Nonpublic Schools. One major impetus for the study was the Illinois Advisory Committee's concern over new regulatory policies for nonpublic schools, reportedly under consideration in Illinois. In numerous respects, however, we have found it analytically useful to examine, not only state controls for nonpublic schools, but the state's responsibility to impose guidelines, standards, safeguards, and other prescriptions in public and nonpublic educational sectors. Our research has been in no significant sense empirical. Rather, the author has attempted to draw together, analyze, and build upon, numerous strands of relevant thought from efforts under way elsewhere, from recently completed investigations, and from literature spanning many decades. Early in the study, John Elson of the Mandel Legal Aid Clinic of the University of Chicago agreed to provide the legal analysis found in chapter 4. Further assistance was obtained from Bruce Cooper of the faculty of the University of Pennsylvania and James S. Cibulka of the faculty of the University of Wisconsin at Milwaukee.

In the remainder of the present chapter, distinctions essential to the study are articulated, an effort is made to characterize in analytically useful terms the prevailing approach to educational regulation in the United States, and concepts are examined that raise serious questions about that approach. Special attention is paid to the fact that state controls seem primarily designed to dictate child-rearing practices, in contrast to controls that attempt to perform essential protective functions while leaving the processes of education unspecified. Widespread controls of this process-specifying type persist, moreover, despite the availability of alternative methods. In chapter 2 we attempt to identify the rational basis for the prevailing ("programmatic") approach to regulating schools. We analyze the most powerful arguments we have been able to identify in that regard. Since we find these rationales, these stated purposes of regulation, far from adequate, we proceed in chapter 3 to examine what may be the most plausible unstated reasons for current state controls in education. Elson's legal analysis, as we have already noted, appears in chapter 4. Finally, our conclusions and recommendations, along with a summary of the earlier chapters, appear in chapter 5.

We must begin with a central distinction: *Programmatic* controls, as defined in the present study, are controls which prescribe *how* children must be reared. For instance: when a state demands that all youngsters attend schools, regardless of whether they or their parents prefer learning experiences in other settings, it is imposing programmatic controls. Thus, numerous courts have held that home instruction, no matter what its quality may be, is not acceptable in lieu of school attendance,[1] and until the recent Supreme Court decision in their favour,[2] the Amish were harassed, arrested, fined, jailed, and deprived of their property through sheriffs' sales for substituting their impressively effective post-elementary system of learning-by-apprenticeship-to-parents for conventional high schools.[3] Obviously, the states in which these occurrences have taken place are not content to demand certain essential understandings and skills, but have insisted upon prescribing the institutional *context* in which these competencies must be developed. In effect, furthermore, since schools must fulfill certain requirements to be recognized for compulsory attendance purposes, these states have dictated the *means* by which the understandings and skills must be acquired. Laws which spell out teacher qualifications, methods of pupil management, and curricula are obviously programmatic. Their effect is to dictate processes of child-rearing, at least during the extended periods when attendance is mandatory. In addition, our system of educational governance permits local majorities (acting in behalf of the state) to impose a particular style of life in all public schools in a given area. Our financing arrangements penalize families for opting out of the public system.[4] Our society is gradually tightening programmatic controls for the nonpublic schools that ostensibly exist as alternatives to government-operated schools. (There is a marked and growing tendency for school codes to demand that nonpublic schools be patterned after the public schools in fundamental particulars.[5]) The state is saying to future citizens and their parents, by implication, that they cannot be trusted to determine what preparation for adulthood is essential in the modern world. Otherwise, why the compulsion?

Strangely enough, these limits on the discretion of all parents are confined to areas generally regarded as "education."[6] Except in cases of stark wrong-doing, parents are free to decide, outside the hours of compulsory school attendance, what will be provided to their children by way of clothing, shelter, food, medical care, recreation, discipline, companionship, and neighborhood characteristics.

This deep bias against family decision-making in education persists, moreover, in the face of frequent contentions that it is inefficient.[7] Children vary markedly as to the conditions of learning to which they respond. Some youngsters require expensive equipment and remedial instruction to overcome their handicaps. Others need only minimal attention from a teacher, find classrooms oppressive, and learn many subjects best at home, curled up with a book, or tinkering with a ham set. Still others have talents and interest that are furthered most effectively through private lessons, observation of skilled performers, or experience on the job. The burgeoning, but still numerically insignificant "alternative schools" movement is one apparent result of a spreading awareness that youngsters require a wide variety of learning opportunities.[8]

Under our current system, however, a single expenditure level normally is determined through political mechanisms for each school district, though logic dictates spending more money on schooling for some children than for others. Furthermore, a striking similarity is reflected in the programs on which the money is spent.[9] Giving parents more freedom to determine what types of schooling will be utilized, and what other learning experiences will be substituted for schooling, could produce a more efficient allocation of available funds, and in some respects (by producing better results among children who do not respond well to orthodox programs) greater equality of educational opportunity.

In his presidential address to the American Educational Research Association in 1972, Robert Glaser sought to explain why, though individualization of instruction had been emphasized repeatedly since at least 1911, "time goes by with still only a recognition of the problem, and as yet, no directions toward solution realized."[10] We seemed to be caught in a "selective mode of education," Glaser observed, "characterized by minimal variation in the conditions under which individuals are expected to learn."[11] The methodology of American schools is so homogeneous that opportunities to study the effects of unconventional approaches with adequate samples are generally nonexistent. Hanushek and Kain, in critiquing the landmark Coleman study, point out that Coleman examined only an "exceedingly limited" range of educational practice, not because he was myopic, but because his national sample of schools exhibited an extremely narrow range of practice.[12] What does not exist can hardly be examined empirically! We cannot expect much progress in educational research, Hanushek and Kain assert, until many schools engage in "truly radical" experiments--experiments that "involve a wide variety of educational practices and explore ranges of input variation in both novel and traditional educational techniques not presently found in the public schools."[13] But if conventional approaches are made legal requirements, how can we expect radical experiments to occur more than spasmodically?

Given our general ignorance concerning the efficacy of various child rearing practices, it could easily turn out, in fact, that programmatic controls make schools worse than they would otherwise have been. To support this possibility, we need not agree with Christopher Jencks, author of one of the most comprehensive analyses of school effects produced thus far, that professional educators know virtually nothing about how to make schools more powerful instructional experiments.[14] If the basic canions of scholarship are observed, even the most optimistic interpretation indicates that surprisingly little can be asserted confidently, in the light of the empirical evidence, about what differentiates the bad schools from the good.[15] In circumstances like these, the onus seems to be on the proponents of programmatic controls. To justify their apparently arbitrary stipulations, surely they are obligated to provide some particularly compelling rationale. Our search for that compelling rationale is reflected in chapter 2.

It should be obvious, however, that the possibility of casting ineffective practices into legal concrete is not as ominous in a democracy as the threats to individual liberty that programmatic controls may pose. In the latter connection, we must draw a distinction that Elson expresses in somewhat different terms in chapter 4: In most areas of life, state legislatures and administrative agencies must be granted wide discretion, so long as their actions are not demonstrably malicious or arbitrary. If government were permitted to take only those actions that were manifestly essential and manifestly wise, our complex society could not function. We have developed numerous mechanisms, however, in an effort to give special protection to rights so vital to a democratic society that they may be infringed upon only for the most urgent reasons. Among these fragile yet crucial liberties, according to the Bill of Rights and scores of Supreme Court decisions, are freedom of speech, freedom of the press, and freedom of assembly. It is a fundamental assumption of our political and legal institutions that the best way to prevent totalitarianism is to keep the marketplace of ideas as open and unlimited as possible.

Should schools be regarded as particularly vital forums for exposing people to ideas, orthodox and unorthodox? In chapter 4, Elson voices the hope that the Supreme Court may soon move toward that position, though he characterizes the Court's examination of the relevant issues thus far as incomplete.

At least for those many citizens who appear to stop reading and exploring new ideas as soon as they leave school, one could argue that state control of education is more dangerous to liberty than state control of the press. But strangely, many people who profess passionate attachment to freedom of the press and free speech see no problem in permitting the state to determine what may and may not be examined and pursued in schools.

Little attention is given in our society to the fact that the state, when it prescribes child-rearing practices in areas of widespread, deeply felt disagreement, is in effect attempting to impose some selected view of the good life on everyone. If programmatic controls are not based on some concept of the life worth living and the competencies such a life requires, are not those controls arbitrary and irrational? But an Old Order Amishman's view of happy, responsible adulthood is far different from the concept of most middle-class suburbanites, and it implies a radically different educational approach. Who is sufficiently omniscient to decide which way of life is better for everyone? The life style that the national mainstream exhibits is anathema to many American Indians, Blacks, Hutterites, intellectuals, and proponents of radical countercultures. Some segments of our society still place high value on future orientation, achievement drive, acquisitiveness, individualism, and competition. To other people, these tendencies are loathesome, the root of most unhappiness. What values should the schools promote through the curriculum, the social system, or the modus operandi? Even among people who espouse the same general ideals, there is dissension: some, hoping for gradual, comparatively painless reform, want children socialized primarily in terms of our imperfect social order (so these children will not be unhappy misfits), while others want the young prepared to be forceful agents of change, even at the risk of personal malaise. Forms of schooling that some cultures find congenial are utterly disruptive to others; to transplant Scarsdale's purportedly superior schools to the Pine Ridge Sioux reservation, for example, would promote, not educational equality but the destruction of the Indian's social structure.[16] As the Supreme Court itself has recognized, to force Old Arder Amish adolescents into conventional high schools is virtually to ensure the dismantling of the Old Order.[17] It seems, then, that when state officials enforce programmatic controls upon dissenting groups is an ostensible effort to guarantee "a higher standard of education," the basic issue is being obscured by bureaucratic rhetoric. The basic issue is: Who has the right to determine what ideals will be expressed in the relevant child-rearing programs?

It may be useful at this point to consider four instances that illustrate important characteristics of existing educational controls in our society:

Example 1: The Persecution of LeRoy Garber.[18]--LeRoy Garber's daughter Sharon, who lived with her Old Order Amish parents on a small farm southwest of Hutchinson, Kansas, graduated with virtually perfect grades from a small rural elementary school in 1964. Sharon loved learning, but felt it wrong, as most members of the Old Order do, to attend a public high school. With her father's encouragement, she registered for a high school correspondence course from the American School in Chicago, perhaps the most reputable of the nation's correspondence institutions. While working part-time in a greenhouse, she completed the four-year curriculum in thirty months with an average percentage grade of 95.69. Ervin Stutzman, the greenhouse owner, described Sharon as "the best help we've had yet." She dreamed of a greenhouse of her own some day and devoured books on horticulture in an effort to master the trade. He never had to explain anything twice to Sharon, said Stutzman. She learned to type so she could handle his correspondence. When the adding machine was unavailable, she would calculate transactions mentally, using various short-cut methods she had mastered. She was the first employee Stutzman ever trusted with the critical task of planting.

In addition, Sharon attended classes once a week in an Amish "vocational high school" described elsewhere.[19] Many informants described her as a superb cook, skillful seamstress, unfailing green thumb. Interviews with people who knew her elicited no complaints concerning her character or competence. At one point she published an account of the ordeal the family went through when her father was hounded to court and fined for failing to send her to a conventional high school. It would be encouraging if the majority of high school graduates could write as well.

From one standpoint, at least, it was ludicrous to prosecute LeRoy Garber for allegedly depriving Sharon of a decent preparation for adulthood. She was literate, employed, sociable, happy, law-abiding, intelligent, and well-read. There was evidence in Kansas, furthermore, that Old Order Amish children who later decided to go to college obtained mostly above-average grades despite their lack of any high school attendance.[20] What more could be required by a state whose schools were failing to produce comparable results with thousands of city children?

But a particular view of the prerequisites of the good life apparently was reflected in Kansas laws. The district judge declared, with later concurrence from the state's supreme court: "The defendant has not complied with Kansas compulsory school attendance laws. . . . To comply . . . such child must attend a private or parochial school having a school month consisting of four weeks of five days each of six hours per day during which pupils are under direct supervision of its teacher while they are engaged together in educational activities."[21] The decision implied, obviously, that certain essential capabilities could be developed only through prolonged exposure to the standardized institutions that the state recognized as "regular schools."

Example 2: The Busting of the "Cooperative School".--[22] The Cooperative School (as we will identify it pseudonymously) was a small experimental school in a large Midwestern city. Coop's program deliberately departed from conventionality in numerous respects. Its sponsors attempted to obliterate boundaries between school and community; to create unusually enduring relationships between pupils and teachers; to utilize a very large ratio of adults to children; to feature multi-age grouping extensively; to minimize distinctions between teachers, helpers, parents, and other adults; to depend primarily on "open classroom" techniques; to encourage expressions of affection; to replace competition with cooperation; to encourage relationships between people as people rather than as role incumbents; and to rely on rules as minimally as possible. The school had been observed rather extensively by students and professors from the city's universities. Most observers seemed favorably impressed. There was no evidence that the pupils were failing to master the state-prescribed subjects of study.

On January 23, 1970, the state's attorney's police suddenly entered, closed, and padlocked the Cooperative School. Students, staff members, and parents were arrested, taken to the local police station, booked, and released on bail. The school remained padlocked for six weeks before a judge could be persuaded to nullify the police action. "The Bust," as the incident came to be called, was memorialized by a staff member who switched on a tape recorder as the officers arrived. Some verbatim excerpts from the transcription follow:

[The police entered the building under the allegation that one of the thirteen-year-old girls, who had grimaced and waved her hand at a squad car parked in front of the school, was "soliciting" them. As they came through the front door, a staff member confronted the officers.]

> Staff Member: What are you doing here? What do you want? This is private property, a school.
>
> Officer: Prove you're a school and you're a teacher.
>
> Staff Member: Do you have a search warrant to come onto private property?
>
> Officer: Do you have a lease to prove this is your property? For all we know, you may be trespassing.

[At this point, a student begins to play a guitar. The music continues as background to the entire affair.]

> Officer: You could all be burglars, for all we know. Is the school private or public?
>
> Staff Member: Get out of here; you have no right to be here.
>
> Officer: I have as much right as you. Are you a school? I don't see no sign. Oh, that's a homemade sign. I don't see a real sign.

[At this point a student begins reading an original poem to prove he is attending a school. A mother, having seen the squad car, bursts in frantically.]

> Parent: You're not supposed to be here! You need a warrant.

. . . .

Officer: A young lady did something our front. And you don't have separate washrooms for "boys" and "girls." It's a violation of city codes.

. . . .

Officer: We had better take these people down to the station where specialized people will handle them. The paddy wagons are outside.

Black Parent: Remarkable. When I called the youth division because a street gang had beaten up my boy, they never came. But a whole squad came to arrest 10 kids.

Officer: What's the tape-recorder on for? We have our own equipment. If we want anything recorded, we'll do it.

Example 3: The Let-Down of Several "Free Schools."[23] New Mexico exempts members of the rather elitist Independent Schools Association of the Southwest (ISAS) from the state's own approval mechanisms. A number of "free schools" in New Mexico, unable because of their unconventionality and other factors to secure admission to ISAS, asked that a state-wide association of free schools be granted the same exemption. New Mexico officials refused, asserting that local and state-wide groups were too susceptible to the extremes that were likely to "balance out" in regional and national associations.

Example 4: Eyebrow Raising at the "Country School".[24] The "Country School," located in a bucolic setting in an agricultural state, is a Quaker boarding school that places heavy emphasis on equality, cooperation, manual labor, and learning-by-doing, in keeping with well-known Society of Friends traditions. All students, male and female, are required to take turns at various tasks around the farm-like campus for many hours each week. The students cook; sew; wash dishes; sweep floors; make beds; construct buildings; tend gardens, orchards and fields;

and take care of animals. But at one point, officials from the state's Department of Education threatened to rescind the school's state approval for lack of the prescribed number of Carnegie units of classroom instruction in "the practical arts." To exhibit competency by doing the "practical arts" was apparently no fit substitute for sitting in classrooms and talking abcut them. Or perhaps the real, but unspoken issue concerned hidden (rather than stated) curriculum requirements (a matter discussed later).

We do not assert that these examples are representative, but merely that they illustrate (even if in unusually stark detail) the consequences of existing state approaches to the regulation of schools. Some of these incidents emphasize rather dramatically the threats to individual freeom that are involved in programmatic controls.

In an earlier passage, it was suggested that the courts have not yet given adequate attention to these dangers. Perhaps educational compulsion has become so familiar in the United States that few people think of subjecting it to careful analysis. As Elson observes in chapter 4, the Supreme Court of the United States provides no clear guidelines on the topic. Our analysis of relevant Supreme Court cases, though proceeding along somewhat different lines, leads to the same conclusion:

> In 1920, a teacher named Meyer in a Lutheran school in Nebraska was prosecuted for using German as the language of instruction in a reading course, in defiance of a state law demanding that all subjects be taught in English.[25] When the case reached the Supreme Court, the attorney for the state

insisted that "the object of the legislation . . . was to create an enlightened American citizenship in sympathy with the principles and ideals of this country, and to prevent children from being trained and educated in foreign languages before they have had an opportunity to learn the English language and observe American ideals."[26] The Court indicated its sympathy with efforts to promote good citizenship: "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally is clear. . . . The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussion of civic matters is easy to appreciate."[27] But, said the Court, no emergency had arisen "which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed."[28] "Evidently," the Court observed, "the legislature has attempted materially to interfere with the calling of modern foreign language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[29] Referring to Plato's suggestion that the state should have complete control of the upbringing of children, the Court commented: "It hardly will be affirmed that any legislature could impose such restrictions . . . without doing violence to both the letter and spirit of the Constitution."[30] The logic behind the state's prohibition of foreign languages in classrooms was not strong enough in the Court's eyes to justify interfering in this blatant way with the liberties of teachers, pupils, and parents.

The Nebraska law involved in the above-discussed case was associated with "anti-foreign" fears that arose in connection with heavy immigration during the decades bracketing the turn of the century, and especially with the xenophobia of

World War I. During and after the war, the Ku Klux Klan, the American Protective Association, and other nativist groups spearheaded numerous attempts to stamp out "foreign enclaves" in the United States. The efforts were probably abetted by the extreme statements of a few scholars. Ellwood P. Cubberley, for example, in his influential 1919 book on Public Education in the United States, described recent immigrants from southern Europe as "largely illiterate, docile, lacking in initiative, and almost wholly without the Anglo-Saxon conceptions of righteousness, liberty, law, order, public decency, and government," professing "no allegiance to the land of their adoption."[31] Parochial schools were often depicted as existing to preserve foreign enclaves and as centers of crime, immorality, Bolshevism, syndicalism, and anarchy.[32]

Further action against these suspect "alien" schools was taken in Oregon by means of a law, passed by referendum, that required all children of compulsory attendance age to enroll in public schools exclusively. (The intent of the law was obviously programmatic--to stamp out socialization practices that state officials disliked. Worse than that, it would countenance no programs at all in nonpublic schools for compulsory attendance purposes, no matter how conventional the programs were.) In the face of the threat to the very existence of their institutions, the Society of the Sisters of the Holy Names of Jesus and Mary and the non-sectarian Hill Military Academy sought judicial protection. When the case reached the Supreme Court, the state argued:

> At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire educa-

> tion of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists, and communists?[33]

Once again, the Court looked favorably upon attempts to promote good citizenship. "No question is raised," the Court noted, "concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[34]

However, the Court could see no significant threat to the general weal in the attendance of many children at non-public schools. The law in question, clearly most arbitrary, was condemned:

> Under the doctrine of *Meyer v. Nebraska*, . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[35]

In a Hawaiian case decided by the Supreme Court in 1927, the government position, once again, was that the compulsion at issue was necessary to good citizenship: "It would be a sad commentary on our system of government to hold that the Territory must stand by, impotent, and watch its foreign-born guests conduct a vast system of schools for American pupils, teaching them loyalty to a foreign country and disloyalty to their own country, and hampering them during their tender years in the learning of the home language in the public schools."[36] But the Supreme Court once more failed to find any clear danger to the general welfare. It struck down the regulations, so extremely stringent as to jeopardize the existence of the foreign-language schools:

> . . . the school Act and the measures adopted thereunder go far beyond the mere regulation of privately supported schools, where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest. They give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks. Enforcement of the Act . . . would deprive parents of fair opportunity to procure for their children instruction which they think is important and we cannot say is harmful.[37]

The Court confronted in 1972 the question of whether a state was justified in condemning a system of informal, on-the-job instruction which Amish parents had substituted for high school attendance. Somewhat as in the cases previously discussed, the state argued that the requirement under attack was necessary "to prepare citizens to participate effectively and intelligently in our open political system" and "to be self-reliant and self-sufficient particpants in society."[38] The Court found that the Old Order Amish had proved themselves good citizens despite general lack of a regular high school education:

> Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief. . . . Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of

the "sturdy yeoman" who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.[39]

Unlike the previous cases, this now-famous Amish school case involved freedom of religion as a crucial issue.[40] The Supreme Court suggested that the right of parents to direct the upbringing of their children might not have been sufficiently compelling in and of itself, unbolstered by the issue of religious freedom, to warrant dismissing Wisconsin's somewhat plausible argument for the benefits of compulsory high school attendance. In the words of the Court:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. . . . Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis.
>
> Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious convictions, shared by an organized group, and intimately related to daily living. . . . As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.[41]
>
> In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious

> beliefs.[42] . . . It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life.[43]

The Court further observed that the strong case marshalled in behalf of the Amish was "one which probably few other religious groups or sects could make." Several statements in this case rather clearly imply that the Wisconsin compulsory attendance law represented a reasonable exercise of state power as applied to virtually all citizens and would not have been struck down in its application to the Amish except for its strident, unambiguous threat to their religio-ethnic way of life. Other parents who disagree with the state's view of essential education apparently run a high risk of being overruled by the Court in cases coming before it. There is little evidence in the Amish school case, or in the cases previously discussed, for that matter, to indicate that the Supreme Court is at all averse to the idea that the state may enforce what it considers a "progressive or . . . enlightened process for rearing children for modern life," so long as obviously unreasonable regulations are not imposed in the process.

To be sure, in some utterances the Supreme Court disparages the notion of requiring all people to adhere to some selected child-rearing approach in the face of strident disagreement, but the decisions made in the context of those statements suggest that the disparagement has but little conviction behind it. In the first of two famous "flag salute cases," for instance, the Court asserted:

> Great diversity of psychological and ethical opinion exists among us concerning the best way to train children for their place in society. Because of these differences and because of reluctance to permit a single, iron-cast system of education to be imposed upon a nation of so many strains, we have held that, even though public

> education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools. . . . But it is a very different thing for this Court to exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country.[44]

The Court decided, accordingly, that children from Jehovah's Witness homes who attended public schools could be compelled, despite religious convictions to the contrary, to participate in a flag salute ceremony. Within three years, however, the Court reversed itself, holding that the children in question could not be compelled to salute the flag in defiance of their religious beliefs. The Court commented:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. . . .
>
> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[45]

The second "flag salute case" implies that in the Supreme Court's view no official can coerce uniformity of opinion and prescribe what shall be orthodox by forcing children to participate in ceremonies symbolizing particular beliefs or allegiance. But the state, while excusing from the flag salute ceremony children whose religious convictions forbade participation, was still free to require that the ceremony be held in the public schools. The implication of the Court's dicta in the Amish school case, further, is that officials may prescribe what is orthodox in the sense of maintaining a rather comprehensive system of educational compulsion (e.g., requiring all children to attend, until age sixteen or seventeen, the rather standardized institutions that the state is willing to recognize as "schools"). It appears that the Court will be moved to intervene when obviously extreme regulations are imposed (such as a bar against foreign languages or the requirement that all children attend public schools exclusively), or when children are forced to verbalize certain beliefs or attitudes that violate religious conviction, but that the Court will not be greatly moved when the state prescribes in considerable detail the subjects and general school regimens to which all children (except those who belong to such unusual religio-ethnic groups as the Amish) must be exposed.

There is room to suggest, we think, that the Supreme Court's attention to the educational implications of constitutionally protected liberties has been superficial. Even the power to prescribe ceremonies and curricula for public schools--to ignore for the moment other elements of educational compulsion--seem to demand less cavalier treatment. Since school attendance is required for so many years of the child's life, and since for many children there is no readily available alternative to public schools, to prescribe what must be included and ignored in the curricula of these schools is in effect to dictate the materials to which most children must be exposed, as well as the materials to be withheld. In the words of Robert Hutchins, "are the decisions of the state with regard to the curriculum final no matter how they may restrict and distort the education of the young? When, if ever, does a state violate the Constitution in limiting the freedom of teachers and students?"[46] Hutchins complains, in this connection, concerning "the immaturity of the law, the temper of the justices, and the inadequacy of the theory of the First Amendment to which they resort."[47]

The Court also may have given inadequate scrutiny to necessary distinctions among schools which the state itself operates, schools which the state gives major support but does not operate, and schools which the state neither operates nor tenders sizeable subvention. Logically, it would seem that schools not operated by the state should have more freedom from the state's programmatic controls than schools that the state maintains, and that schools receiving no sizeable state subvention should enjoy more liberty still. In the Nebraska case discussed earlier (involving the issue of foreign languages in the classroom), the Court's dicta distinguished between "the power of the state to . . . make reasonable regulations for *all schools*" and "the state's power to prescribe a curriculum for *institutions which it supports*."[48] Whereas the general tenor of relevant cases emphasizes the idea that state legislatures have very extensive power to dictate for public schools, in the Hawaiian case examined earlier the Court struck down a law that gave "affirmative direction concerning the intimate and essential details" of nonpublic schools, entrusted "their control to public officers," and denied "both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks." The law was condemned because "it would deprive parents of fair opportunity to procure for their children instruction which they think is important and we cannot say is harmful."[49] But in more recent cases, the Court seems to have neglected distinctions between public and nonpublic schools, and between state-supported and privately supported schools. In the "free textbook" case of 1968, for example, the Court envisioned a domain of state control over nonpublic schools, state-supported or not, that seems scarcely less extensive than the power to regulate public schools.

> Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of Pierce v. Society of Sisters; if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.[50]

As was noted earlier, Elson elicits evidence in chapter 4 that the Supreme Court may be ready to take a more serious, systematic look at the fundamental rights that programmatic controls often seem to violate in education. We hope so. But how can we explain the Court's apparent willingness, at least up to the present point, to permit the state to impose some vision of "progressive" or "enlightened" child-rearing on virtually everyone, especially since the Court offers no cogent rationale (or "First Amendment theory," if you will) in defense of such a practice? It is hardly tenable to argue that Supreme Court Justices are unintelligent, ethically insensitive men. A more plausible explanation, we think, is that the Court is reflecting the broader societal tendency to accept familiar structures of educational control as too obviously good for the general welfare to warrant serious questioning. Or perhaps the Court is inclined, as many people seem to be, to assume that the only alternative to programmatic controls in education is no controls at all. Let us draw the present chapter to completion, then, by considering the nonprogrammatic controls that seem readily available.

In identifying nonprogrammatic ways of fulfilling the state's responsibility to protect individuals and society from harmful educational practices, we will not attempt in this chapter to provide a comprehensive analysis of each method identified. Elson assesses several of these approaches at greater length in chapter 4, and we will examine the relevant issues carefully in the final chapter, where we must reason our way to a number of policy recommendations. We will also forego, for the moment, consideration of controls relating to health, safety, and the problem of ensuring that public funds will be used for their legislatively designated purposes.

It should be evident in the following discussion that no discernible mechanism of state control in education--including the prevailing programmatic approach--is defect-free. We will examine in chapter 5 the possibility that some combination of strategies is essential.

We begin with comparatively gentle departures from current policy and become somewhat more radical as we go along:

Alternative 1: "License" Educational Substitutions.--As a modest way of easing its programmatic constraints in education, the state could require local school authorities to entertain proposals which parents, students, or schools might make for substituting unconventional educational experiences in lieu of the programs that the state normally demands.[51] The proposals could be evaluated in terms of clearly stated standards of reasonableness. One danger in this approach is that public educational officials might find ways of ensuring that the standards of reasonableness were written so as to inhibit the unconventional, or might interpret the criteria in a much-too-confining manner.

There is no reason, obviously, why the licensing of educational substitutions need be done at the local level. Regional or state agencies could be given the discretionary authority. In addition, steps could be taken to reduce the bias that conventional educational personnel might introduce into the licensing process. For example: Whenever an official saw fit to rule that a proposed substitution was unacceptable, the students, parents, or school affected by the ruling could be free to appeal to a special panel appointed by the governor or the state supreme court. The panel could be composed of people of acknowledged breadth and integrity, drawn largely from outside the "educational establishment."[52]

Alternative 2: Accept an "OK" from a "Reputable" Agency.--Before 1965, the Oklahoma State Regents for Higher Education were requiring graduates of two elite private college-preparatory schools (Casady School in Oklahoma City and Holland Hill School in Tulsa) to enter Oklahoma institutions of higher education on probation, because the two schools in question, willing to have no truck or trade with the state department of education, were unaccredited by that agency.[53] The situation was ludicrous, for graduates of Casady and Holland Hall tended to rank at the very top of their classes in such institutions as the University of Oklahoma.

During the 1964-65 school year, under some pressure from influential citizens, the Oklahoma State Regents established a special three-man committee to consider accepting membership in the Independent Schools Association of the Southwest (ISAS), to which both Casady and Holland Hall belonged, in lieu of state accreditation. Subsequently, ISAS accreditation was so accepted. One important factor in the adoption of the new policy concerned the apparently rigorous evaluation procedures maintained by ISAS. Members of the special Regents committee participated in an ISAS evaluation of the Casady school and reported that it was most impressive. Any other association of schools seeking the recognition now accorded to ISAS would apparently have to undergo the same scrutiny.

Oklahoma interviewees were unanimously enthusiastic about the self-accreditation arrangement for members of ISAS. The fundamental rationale for the approach, apparently, was that nothing would be gained by second-guessing the evaluational procedures maintained by ISAS. ISAS has tightened its evaluation mechanisms since being recognized as an accrediting agency by the Oklahoma Regents. ISAS officials want to be sure, it appears, that this highly advantageous arrangement is not jeopardized in any way. The arrangement protects ISAS members from state controls that might threaten the uniqueness of their programs.

A similar policy was adopted by New Mexico's Department of Education in 1971, reportedly with the same rationale in mind: that there was no point in duplicating evaluations done by reputable associations of schools.[54] This acceptance of ISAS membership in lieu of regulation by state agencies seems to have worked very smoothly in Oklahoma and New Mexico. Nevertheless, some important questions arise: Does a self-accreditation framework of this type provide protection to the elitist nonpublic schools that may need it the least, while leaving the most unorthodox, experimental schools, which need protection the most, to the mercy of conventional state regulation? There is also some danger, perhaps, that a group gaining the status now enjoyed by ISAS will be reluctant to wander far from the beaten path, since doing so might jeopardize its special privileges. Imaginative experimentation often necessitates a willingness to take risks. Sometimes a certain amount of floundering is unavoidable while a school works out new pedagogical methods. A few essential ventures may look bad indeed, in the short run. Furthermore, what looks ineffective in terms of conventional objectives may appear quite different in terms of unconventional, but equally defensible, goals. Can orthodox evaluations reckon with these realities? If not, how can we provide the necessary leeway to experiment?

Alternative 3: Rely on Consensual Safeguards.--An accrediting agency may be viewed from another standpoint--not as the authoritative source of a seal of approval, but as a consensual mechanism. The basic assumption here might be that individual parents or parent-pairs, when acting in isolation, are too susceptible to extreme educational views. Accordingly, the state could require that educational programs be based on collective decision-making at any one of several possible levels. Judith Areen suggests, for example, that since a school necessarily reflects some working consensus, it is itself a type of "private regulation" that rules out the "unacceptable idiosyncracies" of individual families.[35] Along this line, we could require that activities to be substituted for conventional schooling be sponsored by "alternative schools" or some functional nonschoolish equivalent. One major advantage of this approach is that, to the extent it involves agreement among a school's (or "non-school's") patrons, no imposition of an alien way of life is involved (except to the degree that this can occur inadvertently in any educational program by means of processes that the people concerned do not recognize or understand.) If the same rationale is extended slightly, one may regard the self-evaluative efforts of school associations or accrediting agencies as even more likely to "wash out" the idiosyncracies of individual families. But in a pluralistic society, as larger and larger collectivities are required to achieve a working consensus, it is less and less likely that the consensus is closely fitted to the values and aspirations of each family involved. Thus liberty is infringed upon increasingly.

Alternative 4: Require Professional Input, but with Few Constraints on the Product.--The viewpoint is frequently expressed that as a field of practice, education (much like law and medicine) demands highly developed skills and specialized bodies of knowledge, neither of which laymen can be expected to possess. Just as we do not permit people without recognized medical credentials to go into the business of diagnosing illness and prescribing treatments, it may be asserted that we should not permit people without recognized credentials as teachers and school administrators to diagnose learning problems and prescribe instructional treatments. In chapter 2, we assess the extent to which education can claim to be a field of practice with an esoteric, validated knowledge base. But even if we assume that the competencies of duly credentialed professionals must be brought to bear upon educational diagnosis and treatment, it still does not follow that programmatic controls are justified. If wishing credentialed professionals to play a prominent role in the design of all programs functioning in lieu of publicly sponsored programs, the state could simply *require* this involvement--much as some communities require people building homes to file plans drawn by an architect. When the state is not content merely to require professional involvement, but takes the much more sweeping step of imposing programmatic controls, what we end up with, lobbying realities being what they are, is a set of conventionalities promoted for the most part by the organized teaching profession, conventionalities that reflect, not only expert ideas of what constitutes good education, but efforts to promote the status and security of the occupational group itself. If the basic guidelines of educational programs are designed, not through state legislatures and bureaus, which professional associations influence to a marked degree, but by competent individual educators acting in concert with parents, less professional self-aggrandizement and much more diversity seems likely to result.

Alternative 5: Specify Ends, Not Means.--If we want all children to acquire specified understandings and skills, it seems unnecessary, as several writers have emphasized, to maintain the current system of compulsory school attendance and related controls.[56] We could, for example, give parents and children complete freedom to decide how the specified competencies will be acquired, so long as each child demonstrated periodically (by responding to national tests, for example) that at least normal progress was being made.

Alternative 6: Rely on a Disclosure Law Approach.--To the extent that parents may be viewed as reasonably rational decision-makers in education, we may identify a central state function as one of ensuring that schools provide parents with adequate decision-making information. In response to a tendency by some schools to mislead parents, it is hardly the most logical strategy to dictate programs and methods. If accurate information is what is lacking, accurate information is what should be required. The state should require all schools to be informed and informative concerning the extent to which they are achieving the ends they avow. As we will point out in more detail in chapter 5, many categories of information may be identified as the right of the parent to obtain. The state could audit the information on a scientific sampling basis to help ensure accuracy. Procedures and penalties could be set out for the protection of parents and students. With the necessary intelligence from schools in hand, the state could publish an annual handbook summarizing, chiefly for the use of parents, the success each school is experiencing in meeting the goals it has named. It might turn out that parents, thus informed, would be more rigorous than the state in demanding effectiveness of schools. There are also problems with this approach that must be considered later, such as the tendency of humans to ignore evidence in favor of emotion in many decision-making contexts.

In briefly discussing these six alternatives to programmatic state controls in education, we have not exhausted the list of possibilities, as later chapters will make clear. We have demonstrated, however, that numerous options are available. The state need not choose between programmatic controls and no controls at all.

Notes to Chapter 1

1. See documentation on this point provided by Elson in chapter 4.

2. *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972).

3. Donald A. Erickson, "The Plain People vs. the Common Schools," *Saturday Review* 49 (Nov. 19, 1966), pp. 85-87, 102-103; "The 'Plain People" and American Democracy," *Commentary* 45 (Jan., 1968), 36-44; "The Persecution of LeRoy Garber," *School Review* 78 (Nov., 1969), 81-90.

4. When the child attends a public school, the costs are taken out of tax revenues, but when the child attends a nonpublic school, the costs must be provided through private investment (usually on the part of the parent), even though the parent must continue to pay his share of the tax bill for public education.

5. See chapters 5 and 7 in Donald A. Erickson, ed., *Public Controls for Nonpublic Schools* (Chicago: University of Chicago Press, 1969); and Elson's analysis (chapter 4) in the present report.

6. Donald A. Erickson, "Freedom's Two Educational Imperatives: A Proposal," in Erickson, ed., *Public Controls*, p. 164; and E. G. West, "The Economics of Compulsory Education" (pre-publication manuscript, 1972).

7. Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), pp. 85-107; John E. Coons, William H. Clune III, and Stephen D. Sugarman, *Private-Wealth and Public Education* (Cambridge: Belknap Press of Harvard University Press, 1970), esp. chapter 6; Charles S. Benson, "Economic Analysis of Institutional Alternatives for Providing Education (Private, Public Sector)," in Roe L. Johns *et al*., eds., *Economic Factors Affecting the Financing of Education*, National Educational Finance Project, Vol. 2 (Gainesville, Fla., the Project, 1970), pp. 121-172.

8. Bruce Cooper, *Free and Freedom Schools* (Washington, D.C.: President's Commission on School Finance, 1971); Allen Graubard, "The Free School Movement," *Harvard Educational Review* 42 (Aug., 1972), 351-73.

9. Robert Glaser, "Individuals and Learning: the New Aptitudes," *Educational Researcher* 1 (June, 1972), 5-13; Eric A. Hanushek and John F. Kain, "On the Value of *Equality of Educational Opportunity* as a Guide to Public Policy," in Frederick Mosteller and Daniel P. Moynihan, eds., *On Equality of Educational Opportunity* (New York: Random House, 1972), pp. 116-145.

10. Glaser, "Individuals and Learning," p. 5.

11. *Ibid*., p. 6.

12. Hanushek and Kain, "On the Value," p. 139.

13. *Ibid*.

14. Christopher Jencks *et al.*, *Inequality* (New York: Basic Books, 1972).

15. E.g., James G. Guthrie, "A Survey of School Effectiveness Studies" (pre-publication manuscript, University of California at Berkeley, 1972).

16. Rosalie Wax, "The Warrior Dropouts," *Transaction*, May, 1967, pp. 40-46.

17. *Wisconsin v. Yoder*, *supra*, note 2.

18. Erickson, "The Persecution of LeRoy Garber." To those who are familiar with the Supreme Court's notable decision in the Amish school case of 1972 (*Wisconsin v. Yoder*, *supra*, note 2), the ordeal of LeRoy Garber may seem irrelevant, since it is unlikely to be duplicated again. As we demonstrate later, however, the Supreme Court evidenced no inclination to extend similar liberties to other groups, carefully delimiting its decision to the unique religio-ethnic circumstances of the Amish people.

19. *Ibid*.

20. *Ibid*.

21. Quoted in *ibid*., p. 86.

22. Information concerning this example is drawn from Bruce S. Cooper, "Organizational Survival: A Comparative Case Study of Seven American Free Schools" (Ph.D. dissertation in process, Department of Education, University of Chicago, 1973).

23. The information that follows is based upon a lengthy interview with Donald J. Rea, Director of Nonpublic Schools, State Department of Education, State of New Mexico, on February 22, 1973.

24. The description of this case is based upon a visit to the "Country School" in 1967 and a lengthy interview with the headmistress.

25. *Meyer v. State of Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, ALR 1446 (1923).

26. At 393-94.

27. At 401.

28. At 403.

29. At 401.

30. At 402.

31. Ellwood P. Cubberley, *Public Education in the United States* (Boston: Houghton Mifflin Company, 1919), pp. 338, 341.

32. For useful descriptions of the era, see Sister Raymond McLaughlin, A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States, 1870-1945 (Washington: Catholic University of America Press, 1946); Walter H. Beck, Lutheran Elementary Schools in the United States (St. Louis: Concordia Publishing House, 1939); Leo Pfeffer, Church, State, and Freedom (rev. ed.; Boston: Beacon Press, 1967), chapter 13.

33. Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925), at 526.

34. At 573.

35. At 573.

36. Farrington v. Tokushige, 273 U.S. 284, 71 L. Ed. 646, 47 S. Ct. 406, 53 ALR 833 (1927), at 285-86.

37. At 298.

38. Wisconsin v. Yoder, supra, note 2, at 221.

39. At 225-26.

40. Earler cases involving church-related schools did not invoke the Establishment of Religion clause of the First Amendment, for the Supreme Court did not consider that clause, addressed to Congress, to be applicable to the states until the 1940 case of Cantwell v. Connecticut, 310 U.S. 296.

41. Wisconsin v. Yoder, supra, note 2, at 215-16.

42. At 219.

43. At 235. Italics added.

44. Minersville v. Gobitis, 310 U.S. 586 (1940), at 598-99.

45. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 ALR 674 (1943), at 640-42.

46. Robert M. Hutchins, "The Constitution of Public Education," Center Magazine 2 (July, 1969), 8.

47. Ibid.

48. Meyer v. State of Nebraska, supra, note 25, at 402.

49. Farrington v. Tokushige, supra, note 36, at 298.

50. Bd. of Education v. Allen, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968), at 245-47.

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51. Cf. Edgar Z. Friedenberg, "Autonomy and Learning," in Beatrice and Ronald Gross, eds., Radical School Reform (New York: Simon and Schuster, 1969), p. 142.

52. Erickson, "Freedom's Two Educational Imperatives," p. 171.

53. Based on lengthy interviews with key personnel of the Oklahoma State Board of Regents and the Independent Schools Association of the Southwest.

54. Based on a lengthy interview with a key member of the New Mexico Department of Education.

55. Judith C. Areen, "Alternative Schools: Better Guardians than Family or State?" School Review 81 (February, 1973), 175-193.

56. Friedenberg argues: "Standardized testing has developed so massively in the United States, both in quality and in the scale of its enterprise, that it would be both simple and economical to furlough young people from school so long as they reported to a testing center for a day or two each year and demonstrated that they were making normal progress toward the prescribed goals of the curriculum." Edgar Z. Friedenberg, "Status and Role in Education," The Humanist 28 (September-October, 1968), 16. A similar suggestion has been made by Paul Goodman in his Compulsory Mis-Education (New York: Horizon Press, 1964).

CHAPTER 2

THE CASE FOR PROGRAMMATIC CONTROLS

In chapter 1 we suggested that controls in education which specify child-rearing practices, and consequently may be described as programmatic, are a serious threat to individual freedom and an impediment to the improvement of education. We demonstrated that a number of nonprogrammatic strategies were available for carrying out the state's protective responsibility in education. It appears, consequently, that unless we can find some compelling rationale for programmatic controls we will be unable to justify them at all.

In searching the relevant literature and pondering the issues, we conclude that the most powerful rationales for programmatic controls concern the state's responsibility (a) to ensure that children have a reasonable chance to pursue happiness as autonomous human beings and (b) to preserve the social fabric upon which virtually everyone's happiness and autonomy depend . If the state neglects its responsibility, to an avoidable extent many individuals may be deprived of self-fulfillment; society may be burdened by unemployment, indigence, crime, juvenile delinquency, and mental illness; the absence of common outlook among citizens may produce unmanageable strife; and the failure to develop available talent may rob everyone of important benefits.

a. The Rights of Children

Though the generally acknowledged rights of children are numerous and may be articulated in a variety of ways, probably the aspect most pertinent to programmatic controls is the right of the child to choose freely among available ideologies, vocations, and life styles, and to develop the decision-making capabilities that make choice more than a fiction--at least to the extent that his or her inherited characteristics permit. If the state must limit the freedom of parents, educators, and even, in the short run, of children themselves to accomplish this objective, the interference seems justified.

The ideal of using schools and colleges to help produce autonomous human beings lies at the heart of the concept of a liberal education. Thus, for example, Booth emphasizes that the product yielded by a liberal education "is the knowledge or capacity or power of how to act freely as a man. That's why we call liberal education liberal: it is intended to liberate from whatever it is that makes animals act like animals and machines act like machines."[1] Similarly, Redfield insists that our fundamental quest must be for the education that contributes to the achievement of autonomy, "the necessary condition of happiness."[2]

To satisfy this liberal criterion, educational systems must promote the rationality of children and must function as forums in which a wide range of options can be examined freely. This approach is utterly at odds with attempts by state officials to mold children to some selected vision of the good society. It also conflicts with attempts by parents to stamp particular ideologies and life styles into the young by curtailing the opportunity to decide. The goal of education must be a human being who "has learned to think his own thoughts, experience beauty for himself, and choose his own actions."[3] If after considering available alternatives, the individual rejects the national mainstream and becomes an Amishman, hippy, or radical intellectual, the state has no ground to complain. It is assumed that in an unmanipulated marketplace of ideas, the best values and ideologies will gain majority support in the long run. Positions that lose supporters in such a situation presumably have demonstrated a lack of logic. Similarly, if the child of an

Old Order Amishman decides, after viewing the options in a truly neutral school, that he prefers to work for Standard Oil and live in a two-car suburban split-level, in an important sense his parents cannot justly accuse the school of alienating their child from them. The purpose of the education was not to disparage one way of life and exalt another, but to make self-determination possible. When a child who grew up in an Amish home decides that another life style is preferable, the choice is his, not the school's, and not the state's. Why should he be denied the right to choose?

In keeping with this position, Mr. Justice Douglas registered a strong partial dissent in the Supreme Court's Amish school case. The Court, he insisted, had failed to confront the issue of student rights:

> On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an ocean geographer. To do so he will have to break from the Amish tradition. . . . If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parent's, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated his entire life may be stunted and deformed.[4]

Let us assume we are in favor of having the state do what it can to promote individual autonomy. What then can the state do? What educational processes or outcomes are essential, or at least significantly conducive, to the achievement of autonomy? In what respects can these processes or outcomes be guaranteed, or at least made significantly more likely to occur, through state educational controls?

To begin with the simplest aspect of these questions: Certain elementary understandings and skills, virtually everyone seems likely to agree, are probably essential to responsible, autonomous adulthood, at least for the vast majority of people. Though questions can be raised about the cruciality twenty years hence of the Three R's (for most communicating and calculating soon may be done electronically),[5] it seems unjust to burden a child with the risk of growing up without these competencies, especially since further educational opportunities may be curtailed as a result. It is tenuous to assert, similarly, that there is no justification for familarizing all youngsters with the fundamental workings of our society's institutions (political, legal, economic, etc.), so long as the familiarization involves no attempt to promote a particular point of view. (Even people dedicated to revolutionizing society need to know how these systems work.) Without such understandings and skills, most individuals will probably fall far short of the decision-making capacities they might otherwise develop, and they will find many options utterly unavailable. Without the ability to read, for example, they will find many vocations unattainable, will find it difficult to secure access to important ideas, and will be unduly vulnerable to those who attempt to take advantage of them in the affairs of everyday life. In fact, it seems likely that consensus can be reached concerning the reasonableness (if not the clear essentiality) of requiring all children to acquire a basic understanding of a substantial list of areas of study commonly offered in elementary (if not secondary) schools. To acquaint a child with an area of knowledge is something different, obviously, from attempting to promote a life style or ideology, though the two functions are often difficult to separate in practice.

Here we have an argument, then, for demanding that every child be granted at least the essentials of a common elementary school education. Considering the Old Order Amish as an example, the range of options that a simple elementary school education makes available is surprising indeed, even when the education is provided in primitive rural schools. In Kansas, members of the Old Order who decided to leave the Amish fold and enter college experienced remarkable success, regardless of the fact that they had never attended high school.[6] (Usually, they prepared for college independently or through the medium of correspondence courses.) Individuals from the Old Order, almost universally kept from attending high school, can be found successfully pursuing a surprising variety of vocations.[7] Several, for instance, are known to be college professors. Consequently, Mr. Justice Douglas may have exaggerated the necessity of high school attendance. "If a parent keeps a child out of school beyond the grade school," it is *not* necessarily true that "the child will be forever barred from entry into the new and amazing world of diversity that we have today." Much depends on what forms of out-of-school education are available to the child. There is evidence from history to suggest that success in school instruction is more a consequence than a cause of the access minorities to secure to middle-class vocations.[8]

Even if we agree that few people can achieve a reasonable amount of autonomy without the essentials of an elementary school education, however, we have not provided an adequate justification for programmatic educational controls. If we want all children to develop specified understandings and skills, it seems unnecessary to maintain the current system of compulsory school attendance and related regulations. We could give parents and children complete freedom to decide how the specified competencies will be acquired, so long as each child demonstrates periodically (by responding to national tests, for instance) that at least normal progress is being made.[9] Or if reluctant to allow that much latitutde, we could at least "license" proposals from parents and students who wish to substitute other educational experiences for in-school instruction, so long as the proposals meet certain criteria of reasonableness, and so long as students show from time to time that they are learning what the state demands.[10]

We should emphasize in passing one major advantage of limiting state educational prescriptions to those understandings and skills which virtually everyone considers essential to autonomous, happy adulthood: To establish educational policies on the basis of agreement among the parties affected is not to impose a hated way of life on anyone's child, for the state is merely doing what the parent wants. It is no accident that Hutterites have no objection to letting the colony's nursery begin training and indoctrinating their young from an extremely early age, or that many Israeli parents have relinquished virtually total control of their children's upbringing to Kibbutzim.[11] When parents and school are working in concert, nobody has much to lose. In complex societies all over the world, however, state-controlled education arouses parental resistance.[12] The reason is that child-rearing practices sponsored or required by the state in pluralistic societies are at odds with many parental views of the good life and how to prepare for it. Even in pluralistic societies, however, incursions upon individual liberty will be minimized if the state confines its directives to areas of almost universal agreement. Of course, one can ask whether there is any need for state controls when the state is simply demanding what all citizens consider essential. We will examine that question in chapter 3.

Can we stop with the agreed-upon essentials of an elementary school education? Is anything beyond that level critical to the development of individual autonomy? A further prerequisite of autonomy, perhaps, is an introduction during adolescence and early adulthood to options that are too complex for adequate consideration in the pre-adolescent years. The freedom to choose means little if the individual is unaware of alternatives--unacquainted with ideologies, life styles, and vocations not characteristic of his immediate community. It seems plausible to assert, furthermore, that decision-making skills need more honing than occurs in the elementary grades if one hopes to make rational choices in the complex modern world. A familarity with the modes of inquiry of several disciples might help. More problems should be manageable, more occupations accessible, and more leisure activities available after an intensive study of mathematics, belles-lettres, and rhetoric. An involvement in group discussion of historical and contemporary issues seems advisable. Exposure to various sports, fine arts, practical arts, and crafts is a good way to open up vocational and avocational worlds. Great ideas from religion, philosophy, and jurisprudence help illuminate the fundamental dilemmas that all humans must learn somehow to manage. Well planned studies of ethnic and religious groups, of various parts of the globe, and of alternative approaches to ethical issues can be argued for quite cogently.

But educational desiderata of this type can be listed almost indefinitely, far beyond the bounds of student time in the high school and even the undergraduate college. We are forced, then, to confront questions pondered for generations by proponents of liberal education: What knowledge is of most worth? What knowledge is utterly essential? At this point, we encounter many enigmas. To master any area of human endeavor to the extent some scholars think essential, we must neglect areas that other scholars think essential. Available, potentially vital knowledge has become an infinite ocean. If thinkers in the tradition of Herbert Spencer had their way, for instance, all students capable of benefitting therefrom would be given extensive tutelage in science.[13] But if overdone, this approach might produce a good many technically competent barbarians, insensitive to beauty and morality. Many Bernsteins, Hemingways, and Calders might never uncover and develop their talents. Similarly, if we grant all children sufficient training in music, art, crafts, creative writing, and various sports to ensure that potential virtuosi in those areas will be discovered, we may end up with many people essentially naive in several other crucial sectors of knowledge and skill. As a further complication, we must remember that if schools and colleges monopolize too much time, many individuals may be robbed of the capabilities they should develop outside classroom walls. And to add to these conundrums, in planning today's education we must cope with the demands of tomorrow's unknown world in an era of precipitous change.

State officials who act as if they know what areas of knowledge are essential for everyone must possess insights as yet undiscovered by leading scholars, must be unaware of their own ignorance, or must be guilty of collosal pretension, for there is little agreement or certitude among thinkers who have pondered these dilemmas most deeply. As Booth observes:

> Whether from the baffling confusion reigning in higher education today we can extract forms of learning demonstrably more worthy of pursuit than others is not a settled question. . . .
>
> Some questions are not faced cheerfully by most of us in this empirical generation. It is true, of course, that we regularly make choices that are based on implied standards of what is worth knowing. We set degree

> requirements, we organize courses, we give examinations, and we would scarcely want to say that what we do is entirely arbitrary. . . . And yet we seem to be radically unwilling to discuss the ground for our choices; it is almost as if we expected that a close look would reveal a scandal at the heart of our academic endeavor. The journals are full, true enough, of breast-beating and soul-searching, especially since 'Berkeley.' But you will look a long while before you find any discussion of what is worth knowing. You will look even longer before you find anything written in the past ten years worthy of being entered into the great debate on liberal education. . . .
>
> There is something irrational in our contemporary neglect of systematic thought about educational goals. . . .
>
> When C. P. Snow and F. R. Leavis exchanged blows on whether knowledge of Shakespeare is more important than knowledge of the second law of thermodynamics, they were both, it seemed to me, much too ready to assume as indispensible what a great many wise and good men have quite obviously got along without.[14]

No wonder Refield observed: "If we, like the Homeric gods, were immortal, we could learn all possibly useful methods and undertake all the activities for which they prepared us; over an infinite period of time we could perhaps come to happiness. As it is we must, in education as in everything else, make our best guess and launch ourselves into the void."[15]

The question of what is most worth learning, neglected in higher education, seems scandalously ignored at precollegiate levels. But if we cannot identify what everyone must master, by what warrant do we specify what everyone must undergo? Little candidly acknowledged uncertainty is reflected in the relevant school codes, department of education regulations, and local school board resolutions. It is understandable, then, that Robert Hutchins, a leading proponent of liberal education, finds the logic behind conventional school programs "incomprehensible."[16] It is difficult to improve on the observation of Franklin Littell concerning officials who seem to require no justification for their actions: "One is moved to exclain, in the words of Oliver Cromwell to a zealot of his own day, a zealot whose rage was destructive of the public dialog: 'In the bowels of Christ, man! Did it never occur to you that you might be mistaken?'"[17]

But perhaps we have gone too far in applying to the high school ideas on liberal education generated mostly in the context of college-level concerns. Two considerations must be examined in this regard: First, we may be able to identify at the high school level, if not at the college level, areas of study probably essential to anyone's autonomy. Second, since precollegiate students are more easily influenced than their post-secondary confreres, special steps may be needed to prevent indoctrination and other infringements on their autonomy.

As for the first of these two considerations: If some areas of study at the high school level are indispensible, in virtually everyone's eyes, to the achievement of individual autonomy, we need not identify them at the present moment. The point to make here is the one made in considering earlier the essentials of an elementary school education: If state officials cannot identify the vital outcomes of schooling, they have no firm basis for programmatic regulation. If officials can identify indispensible understandings and skills, they have not thereby created a justification for programmatic controls. In such a case, why should the state not let parents and children develop the specified competencies through whatever means they prefer? Why should state intervention not be limited to the cases in which it is shown (through a testing program, for example) that children are not making satisfactory progress toward the acquisition of those competencies? It is difficult to see why not.

In reaching this conclusion, we must recognize a hypothetical exception,[18] however, in that there may be only one way to develop some essential understandings and skills. If no alternative can produce the outcomes the state is entitled to demand, the state is obviously justified in requiring a single, standard approach. We have been able to identify no area of the school curriculum that can be pursued successfully only in standard schools, and for some areas, these schools seem an obviously inferior place for the desired learning to occur. But the "hidden curriculum" (the set of values and behavior patterns that formal and informal organizational procedures seem designed to promote) may represent a special case.

Since Robert Dreeben's publications on the hidden or unstudied curriculum are in some respects the most succinct available, we will use his approach to summarize the most pertinent ideas, though not all reputable writers view the topic in precisely the same way. Dreeben suggests that schooling may be an essential mechanism for developing the "sentiments and capacities" that are imperative for all people who wish "to participate as adults in an industrial nation whose dominant political and economic institutions have not experienced fundamental structural change over the past century."[19] In schools children learn, not so much from their studies as from the patterns of behavior that the organizational structure generates, to relate to others in ways basically different from those learned earlier in the family. In the family, there is a tendency to treat everyone as a unique human being. In the bureaucratic spheres that pervade the larger society, the individual must be capable of working with universalistic norms (which treat all people in a given category the same, disregarding differences among them); of interacting with other people in a limited, specific way (as, for example, when a surgeon deals with the person merely as a patient of a particular type, or when a school principal recognizes that he is not responsible for the misconduct of children during the hours when they are away from school); of differentiating of the attributes of an organizational position from the characteristics of the individual occupying the position (as when a worker calmly obeys a foreman he dislikes); and of forming and tolerating the transient, shallow social relationships that are so common in organizational life. Dreeben thinks "formal schooling . . . may provide psychological capacities that individuals 'require' in their daily activities as the clients (customers, patients, renters, litigants, depositors, passengers) of others in *their* occupational pursuits."[20] While agreeing with Dreeben in many respects, Gintis emphasizes the other side of the coin, viewing patterns of daily life in schools as designed primarily to make people effective *producers* (not consumers or clients) in a bureaucratic society.[21] For instance, Gintis thinks people learn in schools to tolerate long periods of boredom, to master tasks that have no meaning to them, to follow schedules dependably, to compete, to subordinate current interests for the sake of future pay-offs, etc., because these are the behavior patterns valued by most employers.

On the basis of these analyses, we may attempt to justify compulsory attendance at conventional schools by asserting that this policy is designed to provide children, by means of the "hidden curriculum," with competencies entirely essential to the autonomy that is possible in the modern age. Adopting this viewpint, we can easily explain why no state in the union is content to prescribe certain skills and understandings, leaving parents and children free to determine whether mastery will be required in conventional ways or not; why LeRoy Garber was fined in Kansas even though his daughter had mastered all the subjects required by law (see the description of his case in chapter 1); and why schools whose structures depart radically from conventionality are harassed even when their students make good academic progress. Similarly, we are prepared for the disclosure that many employers use school and college diplomas as screening devices, not because these diplomas certify the possession of specific job skills, but because people who have endured many years of schooling without being branded as failures are probably capable of fitting well in most organizational settings.[22]

But is Dreeben on target when he suggests that people who have not learned from the unstudied curriculum of conventional schools how to function in a bureaucracy-dominated world will have great difficulty doing so in later life? In this connection, again, the example of the Old Order Amish people is illuminating, for though the simple elementary schools they usually attend exhibit few of the norms of which Dreeben speaks, and though the Plain People almost never attend high schools, they seem typically viewed by employers as superb producers and by bankers and other business men as superb clients.[23] There are still many examples, furthermore, of non-Amish individuals who, despite extremely limited formal schooling, have achieved extraordinary success in our bureaucratic world. It seems obvious, then, that some people can acquire the competencies of which Dreeben and Gintis write without being conditioned for many years by the hidden curriculum of the conventional school. For all we know, most people can. Even without examining the desirability or essentiality of preparing children to be good cogs in organizational machinery, then, we conclude that we have not yet found a good reason, based on evidence, why a state should impose the structure of the conventional school on everyone.

We must consider now the impressionability of children and adolescents. On the negative side, we are concerned with protecting the young from indoctrination. On the positive side, we want to provide a forum (a cafeteria of alternatives) in which youngsters will confront a wide range of options and develop the capacity to make wise, autonomous choices.

Directly pertinent here is a fundamental theme of the literature on liberal education: to liberate, a school or college must free the student from the biasing impact of all parochialisms, be they ethnic, religious, national, or ideological. The autonomous human being, in this view, makes his choices as an *individual*, unburdened by prior commitments to any group position. To quote Leonard Fein, "liberal intellectuals have cast their lot ... against tradition, ritual, and --community . . . . The traditional liberal perspective maintains its utopian commitment to a world . . . in which the private community would be obsolete."[24] How can we promote this individualistic freedom, this difficult independence, if education is governed by private communities, by special interest groups? The Supreme Court has struck down several efforts to outlaw "special interest" schools, but since, as we noted earlier, it has done little to inhibit the forcible conventionalization of these schools, the educational diversity now judicially guaranteed is more limited than appearances suggest. The vast majority of children are required to spend many years of their lives in conventional schools. Furthermore, leading proponents of liberal education disparage even our existing tolerance of private schools as indefensibly conducive to parochialism.[25] And our society exacts a financial penalty from parents who elect to send their children to schools outside the state-operated system.[26]

Court cases concerned with the justice of this financial penalty reveal that the judiciary generally regards the publicly operated schools as superior to other schools in one important respect: the public schools, unlike the others, are considered neutral.[27] Viewed from the American bench, the public schools are the unbiased forum we seek. They are a cafeteria in which the young confront a wide range of options and presumably have opportunity to develop the capacity to make informed, independent decisions.

The question of whether the state has the capacity to guarantee the neutrality of the schools most children will of necessity attend is both crucial to our analysis and generally neglected. If the state cannot ensure that an educational forum is unbiased, it obviously cannot invoke the ideal of individual autonomy as a justification for requiring all children to spend many years within that forum. Logically it may be forced, as the most workable approach to neutrality, to encourage a great diversity of educational approaches, none of them neutral, but all tending to balance each other off in the national dialog to which they contribute. Let us consider, then, the factors involved in making a school neutral.

Official school observances seem at first glance to be the easiest segment of school activity to neutralize. There is nothing subtle or hidden about them. One can readily determine whether they exist. But evidence on the ineffectiveness of legal directives in education is sufficient to give anyone serious pause. Whatever one may think of Supreme Court rulings on prayer and Bible reading in public schools, the record is clear: the rulings have been widely flouted, and apparently no one can do much about the flouting.[28] In the words of one study,

> . . . there is no necessary and direct relationship between a Supreme Court decision (or, perhaps, other national enactments as well) and actual local practice. The tangible consequences of national efforts at change, we have seen, are the product of an extended process involving many forces and people. The process only starts with enunciation of a new national policy; groups, corporations, individuals, and public officials then interact as their priorities and power permit, shaping the

eventual outcome as nearly as possible to their preferred image.[29]

Many scholars insist, in fact, that it is unrealistic to expect schools to maintain an unbiased stance. In the public schools, at least, neutrality can hardly be achieved unless officials disregard demands for privileged treatment from the same social order that granted their power and privilege. After examining several societies, especially our own, the late sociologist-anthropologist Jules Henry asked, half-despairingly, "Is education possible?"[30] He concluded, his pessimism undiminished, that education (which he defined in the autonomy-promoting sense under consideration here) was not possible in schools maintained by any society or cultural group. The logic of his analysis is straightforward: No social system can be expected to take deliberate self-destructive steps. Since every social system Henry had examined or read about, including our own, seemed based upon obviously illogical assumptions, every one of these social systems depended for its survival upon the inculcation of "socially necessary ignorance." Most citizens, he stated, must believe that their form of political economy is the best, or the system will not work. In societies like ours, the schools must not counteract compulsive spending--by encouraging such groups as the Amish, for example. Nothing of consequence must be done to interfere with the readiness of citizens to march off and kill on command. Henry listed numerous other components of the stupidity that "pays off in the social and political areas over the short run."[31]

There is room to suggest that some of Henry's specific charges are extreme. For instance, what the leaders of a society think essential to its survival often turns out to be dispensible. So far as we can determine, however, no respected body of opinion in the social sciences regards the schools of any society as neutral with respect to the ideologies and life styles they present for the consideration of the young. At least one major historical treatise has as its central theme the remarkable correspondence of schools with the social orders that have sponsored them.[32]

Part of the explanation for biased schools is the myopia that comes naturally with socialization to any life view. When most people in a given locality find a school congenial, they usually consider complaints about discrimination to be unreasonable. Thus, for example, one encounters few mainstream Americans around Amish communities who display any understanding of why the Amish think public high schools are hostile.[33] (The high schools do not appear hostile to Methodists, Jews, and agnostics.) Among numerous striking examples that he cites along this line, Himmelfarb points out the following:

> The society many liberal Christians have seen as secular, either gladly or sadly, is less secular and more Christian from a Jewish perspective. Even those who call themselves secularist rather than Christian tend to have different standards from Jews for judging a culture's secularism and religious neutrality. Two tests of this proposition are the place of Christmas in American life and the question of religious influences in the public schools. For a Jew, no matter how secular, Christmas must be more problematic than it is for a Christian (or ex-Christian) of equal secularity. Despite all the efforts, frequently by Jews, to show that Christmas is no longer Christian (or never was), even Jews removed from Jewish tradition find themselves obliged to engage in casuistries: a tree in the parlor but no wreath on the door or windows, "Seasons' Greetings" rather than "Merry Christmas"--the list is long and wryly comical.[34]

But if easily detected observances are a problem, the curriculum is much more difficult to neutralize. Here again, what one person views as neutrality is outright antagonism to another. For instance, some citizens view an education denuded of theism as neutral. Others disagree stridently. In the light of this dilemma, Counelis offers the intriguing suggestion that the public school curriculum be restructured to present "several theistic and non-theistic outlooks."[35] Though deserving attention, the idea is fraught with difficulties. The idea of confronting a child with competing world views is repugnant to some groups. Some subcultures, moreover, are opposed to the essentially individualistic critical-analytic approach to truth-seeking that so dominates American educational philosophy. Their dialog is more predominantly with the group experiences of the past. They are more preoccupied with wholeness and continuity, with "the thoughts that wound from behind." Often persecuted for generations, they distrust the artificer, the inventor, the intellectual, "those who built vast mountains of information and wrote the code books and pointed mankind toward ends of which they were profoundly suspicious."[36] And today, now that much of the world's treasure has been misused and destroyed by cunning men who experience no inwardly wounding thoughts from behind, these groups are gaining allies.

As for the way curricular materials are presented, widespread efforts have been made in recent years to render instructional approaches more conducive to independent inquiry. Teachers have been urged repeatedly, in many ways, not to present the sciences dogmatically, as bodies of facts to be assimilated, but to familarize students with the modes of investigation scientists use to seek knowledge. The latter approach is liberating. But how can the state make certain that every child will be given this type of educational experience, especially since the number of teachers is so large that we cannot possibly have exceptionally qualified people in most classrooms? There is research to suggest that despite more than a decade of extensive efforts, funded by millions of federal and foundation dollars, to produce inquiry-oriented instruction in the physical and biological sciences, teachers as a whole--including those who have participated extensively in special institutes--merely adapt the new materials to the old methods.[37]

In connection with the presentation of controversial topics in schools, furthermore, a major complication inheres in the fact that children are profoundly influence by those comparatively few adults with whom they identify strongly.[38] How then can we keep individual teachers and administrators from stamping out, through the influence they exert over the young, minority ideologies and life styles? As one approach, we could forbid discussion of all value-related topics, since few individuals seem capable of presenting positions with which they disagree as cogently as they present positions with which they agree. But since virtually every aspect of life is fundamentally significant to someone, this policy would place a taboo on almost everything, and make the widely documented boredom of the classroom more deadly than ever. And even if we could prevent teachers from presenting unbalanced discussions of value-related topics, we would have to reckon with such nonverbal influences as an attractive or repugnant personality. When admiring and beginning to identify with a teacher, a youngster is likely to acquire some of the teacher's attitudes and values. We could forbid all teachers to reveal their positions concerning issues on which minorities differ fundamentally from the local majority. Then what if the teacher's position becomes known to students, in spite of efforts to conceal it? Should the teacher be required to resign, or failing that, to desist at once from impressing students favorably, lest they begin to identify with him or her and in the process to view his or her position in an increasingly positive light? We could try not to hire any charismatic teachers, since they all have attitudes they may transmit powerfully to the young. At the same time, we should screen out all cantankerous instructors, lest students develop antipathy towards the positions these teachers embody. We could require a variety of ideologies and cultures to be represented proportionately among the attractive and repellent members of a faculty, so as to cancel each other out. Each child could be instructed, during a given school year, by at least half a dozen charismatic teachers, each representing a different position, to avoid uni-directional influences. But all of these approaches are ridiculous! There apparently is no feasible way of neutralizing the tendency of teachers to influence children one way or another on important questions. Furthermore, we cannot expect teachers even to attempt to hide those biases of which they are totally unaware. (One need not study much anthropology to discover that every culture is shot through with unexamined assumptions that members of other cultures find totally unacceptable and repugnant.)

But the aspect of the school that is probably most potent, yet most difficult to neutralize, is the student subculture, particularly during the pre-adolescent and adolescent years. Educators as yet know little about it, to say nothing of learning how to control it. As James Coleman's study suggests, conformity to the norms of student peer groups is apparently induced by the "rating and dating system," which mercilessly dispenses popularity, respect, acceptance into the crowd, praise, awe, support, aid, isolation, ridicule, exclusion, disdain, discouragement, and disrespect.[39] The system's blunt estimation of the student's worth has a profound effect. As Bernard Rosen's work with orthodox Jewish adolescents suggests, most young people may capitulate. In his study, 83 per cent of adolescents observed Orthodox dietary laws if their parents and peers both were observant. When both parents and peers were non-observant 88 per cent of adolescents were non-observant. When parents and peers disagreed, 74 per cent of the adolescents complied with their peers rather than their parents.[40]

It seems patently ridiculous to proclaim educational neutrality when a child from a pacifist minority attends a public school in wartime, when a few Jehovah's Witness children are required to rub shoulders with many peers who consider "Russellite" doctrines inane, when a few Navaho children, reared to practice mutual assistance, are placed in a school where most students compete ruthlessly, and in a hundred other settings where mercilous social sanctions are exercised against children who behave in accordance with minority ideologies, values, and life styles. It is a travesty to view these situations as liberating, conducive to individual autonomy.

Capitulating to these pressures or maintaining his or her integrity, the individual may acquire permanent scars. When Morris Rosenberg compared Catholics, Protestants, and Jews who had been reared in communities where their religious group was dominant with those reared in communities where they were in the minority, he discovered a uniform tendency for the minority-reared to exhibit more anxiety, as reflected in psycho-somatic symptoms, many years later in adulthood.[41] On the basis of hundreds of relevant studies, Bloom concludes:

> Where the home and the school are mutually reinforcing environments, the child's educational and social development are likely to take place at higher and higher levels. Where the home and the school are contradictory environments, it is likely (though our evidence is not very systematic on this point) that the child's development will be slower, more erratic, and, perhaps, with a good deal of emotional disturbance for the child.[42]

As if these impediments to school neutrality and individual autonomy were not enough to cause despair, we must add the contention considered earlier--that the organizational structure of a school, in its formal and informal aspects, far from being a mere container into which ideas of many sorts can be poured, is itself a potent instrument (a "hidden curriculum") for socializing children to a particular life style. In this light, since it seems difficult to conceive of continuing, purposive social activity bereft of structure, the notion of an unbiased education seems equally difficult to conceive. Some life style must be maintained in any school, but every life style is odious and threatening from some cultural and ideological standpoints.

Several scholars are charging that public schools in the United States have been seriously biased from their inception, despite the carefully nurtured myth of neutrality. (Nonpublic schools also have been far from neutral.) Some writers accuse the public schools of deliberate failure in the education of disadvantaged minorities.[43] Others, seeing formal education as much less efficacious than most people assume, declare that its main function is not to promote social mobility, which it allegedly cannot do, but to maintain the fiction that it promotes social mobility.[44] By happy accident (as this argument goes), the schools are so organized that most children from disadvantaged homes are much less successful academically than are children from privileged homes. But if the school is assumed to be an open avenue to success, people who are kept poor and powerless will believe they have nothing to blame but their own stupidity or lack of motivation. Privileged groups will be safe from suspicion and attack while they continue to exploit society and perpetuate their wealth and power from generation to generation. Another body of literature asserts that the bulk of

American schools, dedicated to the "melting pot philosophy," have attempted for many years to destroy ethnic diversity, with the effect, not of creating a new way of life, but of promoting Wasp culture at the expense of other heritages brought to these shores by immigrants.[45] Several sociological studies suggest that the status structure of the surrounding community is echoed accurately, for the most part, in the school. Children whose parents are disadvantaged are discriminated against in many ways on the playground and in the classroom. This is hardly neutrality.

As one important manifestation of bias, the homogeneous approach to instruction that programmatic state controls encourage, as we noted in chapter 1, may deny many children the special programs their cultural backgrounds demand, and thus may rob these children of equal opportunity, withholding the very prerequisites of autonomy that were invoked to justify the controls. Also, as we have seen, this treat-everyone-the-same approach is a threat to minority cultures themselves.

On the basis of the foregoing analysis, we are forced to conclude that the ideal of the neutral educational forum, being unattainable by any means now discernible, can hardly be used to justify programmatic controls. There is no neutral school. If it could be demonstrated that some schools, even if not neutral, were much more conducive than other schools to the development of individual autonomy, we might be able to construct a somewhat plausible case for channelling children into the former schools rather than the latter, but we can discern no reliable criteria for making such distinctions among schools. What many people consider a close approach to neutrality may turn out, on closer analysis, to close off important options, and what many people consider unusually confining approaches to education may have a surprisingly liberating effect. Pertinent here is the previously discussed fact that graduates of Amish schools seem to move readily into mainstream society when they decide to do so, whereas the public high school appears to create a trained incapacity to live as an Old Order Amishman. The Black Muslim schools, which send some state legislators into tirades, teach that white people are devils, but apparently have the effect, when combined with other aspects of the Black Muslim social system, of imbuing children with a very traditional middle-class Protestant ethic.[47] The available evidence suggests that Black Muslim schools, partly by creating ethnic pride and a sense of self-worth, prepare their students to function well in many middle-class vocations.[48]

We are back, consequently, to the implication mentioned earlier. If a state wants to approach neutrality in the education of its young, the most viable strategy may be to encourage a great diversity of child rearing approaches, none of them neutral, but all tending to balance each other off in the national dialog to which they contribute. Of course, the state can also urge all schools to do what they can to decrease bias and to maximize the range of options made available for consideration by the young. It is probably feasible to reduce the parochialism of most schools. The question is whether state programmatic controls facilitate or impede progress to that end.

As another way of minimizing the forcible indoctrination of children and adolescents, the state could abandon or minimize compulsory school attendance, particularly during the critical years of adolescence, pour less of its largesse into programs designed as a once-for-all treatment for children, and sponsor unprecedented development of educational opportunities available throughout life.[49] In such a context, an individual who attended a seriously biased high school or none at all could rectify the problem later. Deciding as an adolescent or adult to defect from some dissenting subculture, one could spend a few months in the nearest educational way-station, acquiring the competencies needed to pursue one's interests further.[50] Changes in occupation and way of life are becoming an accepted, frequently encountered phenomenon, and the trend seems likely to intensify. Large numbers of citizens--not just a few people from dissenting homes--will requite periodic retraining. The pattern of the future may be cyclic for many people--a few months of instruction, a few months without it, a few months with it, a few months without it. As adult education becomes more important, adolescent schooling may be less important. And if the state is not forcing impressionable youngsters into schools where they will be influenced toward the views of the local majority, many current incursions upon individual liberty will be avoided. It is less crucial to autonomy that adult education be strictly neutral.

We have criticized as unrealistic the liberal ideal of providing all children with neutral schools. We have maintained that there is no neutral school. Now we must assess the possibility that attempts to free the student from the biasing impact of all parochialisms--ethnic, religious, national, ideological--are not only unrealistic but counterproductive. The individualistic critical-analytic method that liberal educators have tried so long to promote "presupposes a basic disjarment between the thinker and his ground of being, both toward nature and toward the social matrix. That is its grandeur, its creative tension, and also the source of personal and social despair."[51] The quest for a type of individual autonomy that is unbiased by prior commitment to religion, to ethnicity, to locality, to nation, "has admittedly been one of the most torturous enterprises of modern culture."[52] The quest is antagonistic to the very emphases upon community, tradition, ritual, and history that may be essential to psychological health and thus--deep irony!--to autonomy and rational decision making for most people. This hostile posture toward tradition, ritual, and community may conceivably contribute to an often-noted anti-historical neglect of the dialog with the past, to an unconcern for human wholeness, and thus to the narrow-minded logic that produces massacres of women and children in the name of national honor, bombings concealed by deceit in the federal executive, and the warped morality of Watergate and the Ellsberg trial.

A leading theme in recent social analysis has been widespread loss of identity in a mass society whose modernization and bureaucratization intensify at a quickening pace. Thus Alter speaks of "a frantic urgency to become in the face of all the forces that seem subtly or crudely to coerce the self."[53] He depicts recent Black Power outbursts, radical protest activities, and counter-cultural developments as largely "the violent throes of a collective identity crisis," . . . "in one way or another reactions against the increasingly 'rationalized' nature of American society, the growth of bureaucracy, large-scale if ineffectual social planning, computerization, corporate commercialism, mindless standardization through the media."[54] Glazer traces the failure of much recent social policy to the weakening of the social fabric that is essential to human well being.[55] Bronfenbrenner blames drug abuse, delinquency, rejection of society's central values, and other prominent symptoms of alienation on the many institutions (especially schools) that deny children the kind of exposure to others that they need to develop their humanity. He laments "the trend toward the construction and administration of schools as compounds isolated from the rest of the community."[57]

Many other examples could be cited from this body of literature. But strangely, as Fein notes, though it is widely recognized that participation in a relatively small, cohesive community is essential, for most people. to the development of a sense of identity and the ability to relate humanely to others, the implications of that recognition for the old view of a liberating education have been left largely unexamined.[58] Obviously, schools cannot simultaneously foster in the student a strong identification with his natal group, and dismantle in the student, on the other hand, the community loyalties and commitments that so many liberals view as impediments to autonomy.

A number of writers--notably Novak--may go too far in insisting that a full-fledged reemphasis on ethnicity is the only answer to our societal malaise.[59] While some people may be unable to function well without the security that comes from ethnic roots, for others religion, some brand of nationalism, or a particular ideology may fill the same need; and a certain percentage of the population may successfully follow the lonely route of attempting to escape all the subjugations communities seek to impose. However, the essential point is that, since the liberal ideal of freeing the student from all parochialisms is destructive of community, it may be profoundly counterproductive for most people.

It may be counterproductive, as we suggested earlier, not only because it robs individuals of identity, but also because it robs them of the dialog with the past that close-knit communities of long standing typically promote through orally communicated traditions, reenactment of key events, symbolism, ceremony, and other means; because it robs them of a philosophical base, implicit or explicit; and because it robs them of a concern for, and sense of, personal wholeness, centeredness, and integrity. The possibility must be entertained, contradictory as it may seem, that our society will make more progress toward rationality by encouraging community loyalties than by attempting to destroy them. Even the most insulated of communities (for example, the Amish) have exhibited profound adaptations over time.[60] In a basic sense, no group can escape involvement in our national dialog. The extent to which individuals can be kept ignorant of options in a world so permeated by mass media may be more limited than critics of dissenting groups generally imagine.[61] Thus, despite all efforts of their elders to isolate them, many Amish adolescents have been known to drive their buggies to the homes of friends in nearby towns, change into "English" clothing, sow a few oats, and later journey home in buggy and Amish garb. Tourists come. Mainstream society is encountered again and again. We should probably be surprised, not that youngsters become aware of options outside their small neighborhoods, but that any cultural diversity survives in the age of the transistor.

Perhaps the most rational interchange of ideas will occur when communities are secure from attacks upon their unique values and when individuals are free from doubts about who they are. Since we can find no way to dismiss these possibilities, we see no cogent way to argue that the state has a right to impose programmatic controls wedded to the liberal ideal of individual autonomy unbiased by community commitment.

b. The Survival of Society

A second major rationale requiring analysis here asserts that programmatic controls are indispensible to the preservation of society, and thus to virtually everyone's well being. Not much autonomy is possible, nor much happiness, without the facilitating framework, however imperfect, that society provides.

One pertinent body of thought stresses that future citizens must acquire--if necessary through compulsory means-- a significant range of common experiences and viewpoints, on the theory that this commonality will weld society together. James Conant clearly had this idea in mind when he stated: "The greater the proportion of our youth who attend independent schools, the greater the threat to our democratic unity."[62]

Another relevant view emphasizes that schools must, as a means of preserving society, promote the attitudes and understandings citizens need to participate effectively in our political processes. Early in the effort to establish a system of free public schools in this country, such articulate educators as Horace Mann, Henry Barnard, John Pierce, Calvin Stowe, and Caleb Mills, along with such political figures such as Daniel Webster and Edward Everett, expressed fear that, unless the public school system were established, the nation might fall under the control of an ignorant, uninformed electorate.[63]

Taking a closely related stance, one may argue that society cannot function unless citizens possess certain skills purportedly critical in modern institutions. Thus a leading student of comparative education declares:

> A complex, closely-textured society requires not only uniformity of language, of number systems, and of basic knowledge and beliefs about the operations of the principal organizations of the society, such as the post office or the tax system. Such a society requires also a broad uniformity of various conduct norms: punctuality, diligence, future orientation, planfulness and honesty, not to mention a certain standardization of etiquette. For many pupils it is as difficult to learn these practices and attitudes as to learn a foreign language or mathematics.[64]

These three variations on the theme that schools must help preserve society by providing certain common attitudes, understandings, and skills exhibit one weakness: No one knows what attitudes, understandings, and skills are truly essential to the survival of our social order, and no one knows when a society has developed too much commonality for its own good. Furthermore, state officials are probably the last group we should trust to decide how much commonality is essential to the general weal. It is in the interest of these officials to discourage the dissension and diversity that may jeopardize their positions, subject them to challenge, and make public institutions more difficult to govern smoothly. Some efforts to promote unity, in fact, may backfire. We discussed earlier the likelihood that most people in the United States are unable to identify more than superficially with mass society. There is some evidence to suggest that individuals who have developed the secure sense of identity found in purportedly disunifying subgroups are more capable, not less, of involving themselves in national affairs.[65]

If the state requires schools to promote commonality of viewpoint and experience, some programs must be mandated in schools and some must be outlawed. Otherwise, since the ocean of available materials and styles of learning is so vast, there may be little commonality among the offerings of different schools. Who then should be trusted to decide what all educational programs must hold in common? Whose version of national unity should be enforced upon everyone? To quote the Supreme Court:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As government pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.[66]

A device frequently used to obliterate this issue is the fiction that the common schools simply emphasize what "all groups have in common."[67] We noted earlier that certain outcomes of education may be considered essential or highly desirable by virtually all citizens in our society, but that these areas of agreement are probably very minimal. Even a cursory look at educational history reveals, however, that the unity the public (and often many nonpublic) schools have sought to promote is neither limited in compass nor composed exclusively of what "all groups have in common."

So pervasive is the domain of common experiences and understandings promoted through state programmatic controls and related policies that some scholars think government has adopted an official "civil religion" and designated the public school as an established church.[68] That religion, such scholars assert, is comprised of the values, beliefs, myths, loyalties, ceremonies, etc., generally subsumed under the rubric, "The American Way of Life." The nation's civil religion is reflected in the rhetoric and visual symbols of many public ceremonies (e.g., Presidential inaugurations, celebrations on Memorial Day and July 4th). Civil religion is not a substitute for, or rival of, Protestantism, Catholicism, Judaism, or any other instrument of personal piety, but rather a somewhat parallel device that performs vital civic functions. At one time, as the argument goes, the events of the Revolutionary War constituted our civil religion's Exodus. "The Declaration of Independence and the Constitution were the sacred scriptures and Washington the divinely appointed Moses who led his people out of the hands of tyranny."[69] Later, the Civil War became the motif of national redemption, with its overtones of death, sacrifice, and rebirth. Memorial Day, "a major event for the whole community involving a rededication to the martyred dead, to the spirit of sacrifice, and to the American vision," gave ritual expression to these themes.[70] The nation's public schools allegedly have played a central role in keeping the civil religion truly national.

Bellah thinks "the public-school system serves," for example, "as a particularly important context for the cultic celebration of the civil rituals."[71]

Michaelson suggests that we have assigned public schools a dynamic role "in eliciting and instilling what I have called public piety."[72] Perhaps, in his view, "the public school can be understood as doing in the United States what the established church did in medieval Europe."[73] In support of this possibility, he cites a blue-ribbon commission of the National Education Association as stating in 1951 "that the development in children of devotion to the moral and spiritual values central to the American heritage . . . 'is basic to all other educational objectives.'"[74]

We will not attempt to demonstrate that this concept of an established civil religion promoted through the schools is entirely accurate. For our purposes, the significant fact is that the common experiences to which the vast majority of the nation's youth are compulsorily exposed during most of their formative years are not at all limited to a few essentials held in common by all groups. Rather, the legally mandated area of commonality is so pervasive that first-rank scholars can seriously characterize it as a religion and way of life. If it is a way of life, as we observed earlier, we may be certain that it is viewed as hostile and repugnant by numerous cultural groups. If it is a religion, or if it performs the essential functions of a religion, the danger arises that it will be as destructive of the liberty of dissenters as any religious establishment. Parents whose child is alienated from them by far-from-neutral schools are not likely to be comforted by the contention that what these schools promote is "not really religion." The distinction makes no practical difference.

Apart from definitional problems of "religion" and "not religion," it seems evident that the unity promoted by state-controlled schools has never been limited to the ideals all groups in our society hold in common. Reactions to the tide of immigration which hit American shores in the late 1800's and early 1900's made this state of affairs particularly clear. "Let us now be reminded," Calvin Stowe declared, "that unless we educate our immigrants, they will be our ruin. . . . It is altogether essential to our national strength and peace, if not even to our national existence, that the foreigners who settle on our soil should cease to be Europeans and become Americans."[75] The word "Americanization" was soon incorporated into the lexicons of educators and politicians. But for such influential educators as Ellwood Cubberley, to Americanize meant "to assimilate and amalgamate these people . . . and to implant in their children, so far as can be done, . . . the Anglo-Saxon conception of righteousness, law and order, and popular government."[76] The intent of Americanization was clear, at least in the minds of many influentials: the dominance of Anglo-Saxon culture.[77] Diversity, ethnic and religious, was characterized as a "problem" that needed to be obliterated. Historians began to praise the American frontier as the "crucible" and the common school as the "melting pot" of "spiritual transformation."[78]

At times the significant WASPish Americanization thrust was challenged, but not with much discernible success--at least until very recently. To mention just two prominent dissenters:

Early in 1915, there appeared on the pages of The Nation a sequence of two articles under the title of "Democracy versus the Melting Pot." In these articles Horace Kallen wrote:

> We are, in fact, at the parting of the ways. A genuine social alternative is before us, either of which parts we may realize if we will . . . what do we will to make of the United States-- a unison singing the old Anglo-Saxon theme "America," the America of the New England school, or a harmony, in which that theme shall be domi-

> nant perhaps, among others, but one among many, not the only one.[80]

Later, Louis Adamic, an immigrant turned prolific writer, took up the theme of America's multi-cultural heritage and criticized continuous insistence on an Americanization program which implied, through its educational agents, that Anglo-Saxon culture was superior. He blamed feelings of ethnic inferiority and rootlessness among non-Anglo youth on a condescending climate in American schools.[81] His charges seem particularly appropriate to Blacks, Indians, Appalachian Whites, Chicanos, Puerto Ricans, and other groups whose cultures are distinctively different from the national mainstream. Within recent years, a reawakening self-consciousness among ethnic groups has prompted bitter protests concerning the purportedly neutral unity the schools have been promoting.[82] Adding to the chorus of dissent have been many people who grew up from birth in the "good life" that the officially promoted "unity" represents, only to reject its most fundamental values![83] And in the wake of Vietnam, unauthorized bombings in Cambodia, Watergate, the ecology movement, and various "counter-cultural" developments, it now seems clear that the officially defined "commonality" around which all groups in our society join hands in the schools is largely a facade.

Novak voices the acerbic complaint, in this connection, that "the 'divisiveness' and free-floating 'rage' so prominent in America in the 1960's is one result of the shattering impact of 'forced nationalization' upon personality integration. . . . The American system . . . leaves all but a certain human type profoundly deprived--deprived of initiative and symbolic thickness, unable to function in the unconnected way demanded by the ethnic symbols of Wasps: individualism, competition, and merely rational interest."[84] As Alter points out, Novak may have blamed Wasp culture for many invasions of human liberty, in schools and elsewhere, that are more logically attributable to other sources.[85] Alter does not deny, however--for logically he could not--that American schools, whether or not dedicated primarily to the hegemony of Anglo-Saxon ideals, promote a type of "commonality" or "unity" that many groups view as hostile.

We have returned, obviously, to a theme discussed earlier. In a previous passage, we documented the non-neutrality of schools which the states, under the pretense of developing individual autonomy, compel children to attend. Now we conclude that the states, while purporting to accentuate only the values all groups in our society hold in common, use programmatic controls to promote a distinctly biased version of national unity.

We have no argument, as earlier passages indicated, with the contention that the nation's youth must be given a basic understanding of society's vital institutions (political, economic, legal, etc.), as a prerequisite for responsible participation in democratic processes. We have demonstrated, however, that programmatic controls are not essential to the achievement of these ends. As for the more sweeping insistence that children must be forced by law into institutions that will inculcate devotion to our political system, the idea deserves rejection, both because it demands indoctrination in whatever ideals are officially held as good at a particular time, and because it is unrealistic. To repeat a previous argument, to demand a free press while permitting the state to control another, equally vital, marketplace of ideas seems inconsistent in the extreme. For present purposes, it is probably not necessary to analyze at great length the available research on political socialization; rather, we quote an assessment by Cohen:

> First, there is existing research on childrens' political socialization. Although there is a good deal of recent

work in this field, it seems to be concerned with the development of childrens' political attitudes, rather than with the schools' influence on them. Nowhere, for example, has any direct evidence been presented on how much the political attitudes of children vary from school to school. If the configuration of political attitudes in each school turned out to be pretty typical of the political attitudes found in the entire (school) population, there would not be much basis for thinking that schools differ much in their impact on childrens' political attitudes. But no studies illuminate this point.

Let us suppose schools did differ somewhat in this regard. We would then want to know whether the differences were a result of schooling, or other environmental influences--such as the family, ethnic group membership, and so on. Again, however, there is no evidence directly on this point. The relative importance of school and non-school environment in the development of political attitudes is unknown.

There is, however, some indirect evidence. For one thing, much of the political socialization research seems to show relatively little change in childrens' attitudes over time. If political attitudes undergo little change during the school years, of course, it would be hard to argue that schools could have much impact on them. The only exception to this seems to be during the primary grades, which may be a period in which children's political ideas do undergo change. But this is an age at which children receive little or no explicit citizenship instruction, and it also happens to be an age at which family influences are still extremely strong. None of this suggests that there are large school effects on political attitudes.

This is supported by the absence of convincing evidence that the schools have much effect in other realms. Childrens' academic performance and aspirations (which, after all, is what the schools are about), both seem not to be differentially influenced by schools. Aspirations, for example, vary only a little among schools, and they seem to be quite insensitive to variations in school resources and policies. In fact they seem to be affected only by students' family background, academic ability, and academic standing. Roughly the same situation seems

> to hold for achievement. Most differences in student achievement lie within, not among schools, and no combination of school resources and practices seems to have any noticeable impact on achievement test scores.
>
> These findings have been confirmed in a variety of studies, undertaken at different times under different conditions. They show that schools have little differential effect, even in precisely the areas of their primary concern. It is hard to believe, therefore, that they would have more pronounced influence on such secondary objectives as citizenship. In fact, none of the research I have summarized suggests that schools vary much in their impact on childrens' political learning. Indeed, what indirect evidence there is suggests that these attitudes are pretty much invariant over the duration of public schooling.[88]

Cohen probably should have added, in connection with evidence we have considered earlier, that though schools do not seem to have much power of indoctrination, at least for the majority of children, they do seem to have power, when working at cross-purposes with home and community, to wreak psychological havoc in the child, and consequently, to disrupt cohesive communities over a period of time. In some respects, ironically, it seems that schools have more potential to cause harm than to work the good that state controls are purported to guarantee.

Let us now consider the assertion that society cannot survive unless schools inculcate, through the hidden curriculum or other means, the habits and attitudes without which modern organizations could not exist. The problem here is that we can find merely assertions, but no firm evidence. Different scholars, as we have seen, present different definitions of the capabilities that are allegedly essential. Furthermore, over a period of generations, exceedingly complex organizations have been built and manned by people whose schooling was very minimal and sometimes most primitive in nature. As the forces of automation spread, it cannot logically be assumed that the characteristics which make organizational life possible today will do so tomorrow. If we grant the state the right to impose programmatic controls to promote the competencies "needed" in a complex society, then, we are in effect granting the state the right to make arbitrary decisions about what are the needed competencies.

To recapitulate very briefly: In the present chapter we have analyzed the state's responsibility to promote the development of autonomy in the young and to preserve the social framework that is essential to virtually everyone's autonomy and happiness. We have been unable to identify any compelling rationale for programmatic state controls. But controls as pervasive as these can hardly be accidental. We turn in chapter three, consequently, to what may be some "latent" or "hidden" functions of programmatic state controls in education.

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Notes to Chapter 2

1. Wayne C. Booth, "Is There Any Knowledge That a Man Must Have?" in Wayne C. Booth, ed., The Knowledge Most Worth Having (Chicago: University of Chicago Press, 1967), p. 21. Cf. Philip W. Jackson, "After Apple-Picking," Harvard Educational Review 43 (February, 1963), 51-60; and Leonard J. Fein, "The Limits of Liberalism," Saturday Review, June 20, 1970, pp. 83-96.

2. James M. Redfield, "Platonic Education," in Booth, The Knowledge Most Worth Having, pp. 158-59.

3. Booth, "Is There Any Knowledge That a Man Must Have?" p. 27.

4. Wisconsin v. Yoder, 406 U.S. 205, at 244-45.

5. Booth, "Is There Any Knowledge That a Man Must Have?" p. 5: "Indeed, we can survive, in a manner of speaking, even in the modern world, with little more than the bare literacy necessary to tell the 'off' buttons from the 'on.'"

6. Donald A. Erickson, "The Persecution of LeRoy Garber," School Review 78 (November, 1969), 81-90.

7. John A. Hostetler and Gertrude Enders Huntington, Children in Amish Society ("Case Studies in Education and Culture," eds. George and Louise Spindler; New York: Holt, Rinehart and Winston, Inc., 1971).

8. Apparently when the culture of the group is adapted to the norms of middle-class society, two consequences ensue: members of the group do better economically and do better in schools. See, for example: Christopher Jencks et al., Inequality (New York: Basic Books, 1972); and Ivar Berg, Education and Jobs: The Great Training Robbery (New York: Praeger Publishing Company, 1970).

9. Friedenberg argues: "Standardized testing has developed so massively in the United States, both in quality and in the scale of its enterprise, that it would be both simple and economical to furlough young people from school as long as they reported to a testing center for a day or two each year and demonstrated that they were making normal progress toward the prescribed goals of the curriculum." Edgar Z. Friedenberg, "Status and Role in Education," The Humanist 28 (September-October, 1968), 16. A similar suggestion has been made by Paul Goodman in his Compulsory Mis-Education (New York: Horizon Press, 1964).

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10. Cf. Edgar Z. Friedenberg, "Autonomy and Learning," in Beatrice and Ronald Gross, eds., *Radical School Reform* (New York: Simon and Schuster, 1969), p. 142.

11. John A. Hostetler and Gertrude Enders Huntington, *The Hutterites in North America* ("Case Studies in Cultural Anthropology," eds. George and Louise Spindler: New York: Holt, Rinehart and Winston, 1967); Melford E. Spiro, *Children of the Kibbutz* (Cambridge: Harvard University Press, 1958). Cf. Francis Schrag, "The Right to Education," *School Review* 79 (May, 1971), 359-378.

12. C. Arnold Anderson, "State Education and Cultural Alienation" (pre-publication manuscript, University of Chicago, 1969).

13. In his celebrated essay, "What Knowledge Is of Most Worth?" Spencer concluded: "Thus to the question we set out with--What knowledge is of most worth?--the uniform reply is--Science." Herbert Spencer, *Essays on Education, Etc.* (London: J. M. Dent & Sons, Ltd., 1911), p. 42.

14. Booth, "Is There Any Knowledge That a Man Must Have?" pp. 1-2, 3, 4.

15. James M. Redfield, "Platonic Education," in Booth, *The Knowledge Most Worth Knowing*, p. 154.

16. Robert M. Hutchins, "Toward a Learning Society: the Institutional Illusion," *National Elementary Principal* 51 (Oct., 1971), 39.

17. Franklin H. Littell, "Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?" in Donald A. Erickson, ed., *Public Controls for Nonpublic Schools* (Chicago: University of Chicago Press, 1969), p. 79.

18. Another conceivable exception, explored later, involves the possibility that, whereas few demonstrably essential understandings and skills can be identified, exposing children to a wide range of common experiences (however arbitrarily these experiences have been selected) is essential to the minimal unity without which no society can survive.

19. Robert Dreeben, "American Schooling: Patterns and Processes of Stability and Change," in Bernard Barber and Alex Inkeles, eds., *Stability and Social Change* (Boston: Little, Brown, and Co., 1971), p. 101. Also see Robert Dreeben, *On What Is Learned in School* (Reading, Mass.: Addison-Wesley Publishing Company, 1968); Philip W. Jackson, *Life in Classrooms* (New York:

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Holt, Rinehart and Winston, 1968); Norman V. Overly, ed., The Unstudied Curriculum (Washington, D. C.: Association for Supervision and Curriculum Development, 1970); Jules Henry, Culture Against Man (New York: Random House, 1965); Bruce R. Joyce, Alternative Models of Elementary Education (Waltham, Mass.: Xerox College Publishing, 1969); Ivan Illich, Deschooling Society (New York: Harper & Row, 1970); Everett Reimer, School Is Dead (Garden City, N. Y.: Doubleday & Company, 1971). Edgar Friedenberg's description is more bitter than Dreeben's: "There is first an anxious and sometimes brutal intolerance of deep feeling between persons, of emotional commitment to others. This permeates school routines; love and loyalty are violations of its code and are severely punished. . . . Affectionate regard and care among peers is contrary to standard operating procedure, which prescribes instead jolly, antagonistic co-operation and competition. The school breaks up what it calls peer groups bound together by strong personal ties as cliques, which it sees as anti-democratic and potential sources of resistance and subversion. In class, co-operation between friends is cheating." "Status and Role in Education," Humanist, (Sept.-Oct., 1968), pp. 13-17, 32.

20. Dreeben, "American Schooling," p. 101.

21. Herbert Gintis, "Towards a Political Economy of Education: A Radical Critique of Ivan Illich's Deschooling Society," Harvard Educational Review 42 (February, 1972), 87-88.

22. Erickson, "The Persecution of LeRoy Garber."

23. Hostetler and Huntington, Children in Amish Society.

24. Leonard Fein, "The Limits of Universalism," in Henry J. Levin, ed., Community Control of Schools (Washington, D. C.: The Brookings Institution, 1970), pp. 89, 90.

25. James B. Conant, "Private and Parochial Schools," Nation's Schools 49 (1952), 48-49.

26. When a child attends a public school, the costs are taken out of tax revenues, but when the child attends a nonpublic school, the costs must be provided through private investment (usually on the part of the parent), even though the parent must continue to pay his share of the tax bill for public education.

27. See Paul A. Freund, "Public Aid to Parochial School," Harvard Law Review 82 (June, 1969), 1680-92.

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28. See, for example, Kenneth M. Dolbeare and Phillip E. Hammond, The School Prayer Decisions: From Court Policy to Local Practice (Chicago: University of Chicago Press, 1973); Donald R. Reich, "The Supreme Court and Public Policy: The School Prayer Cases," Phi Delta Kappan 58 (September, 1966), 29-32; Elia Katz, "Patterns of Compliance with the Schempp Decision," Journal of Public Law 14 (1965); William G. Howard, "Florida Schools Ignore Ban on Bible Reading," Nation's Schools 79 (May, 1967), 122; William K. Muir, Jr., Prayer in the Public Schools: Law and Attitude Change (Chicago: University of Chicago Press, 1967); Arthur Gilbert, "Reactions and Resources," in Theodore R. Sizer, ed., Religion and Public Education (Boston: Houghton Mifflin Company, 1967), pp. 37-83; Donald A. Giannella, ed., Religion and the Public Order, 1964 (Chicago: University of Chicago Press, 1965), pp. 243-352; Theodore Powell, "The Dangers of Liberty," in Sizer, Religion and Public Education, p. 140.

29. Dolbeare and Hammond, The School Prayer Decisions, p. 133.

30. Jules Henry, "Is Education Possible?" in Erickson, ed., Public Controls, pp. 25-102.

31. Ibid., p. 87.

32. Newton Edwards and Herman G. Richey, The School in the American Social Order (2d ed.; Boston: Houghton Mifflin, 1963).

33. Donald A. Erickson, "The 'Plain People' and American Democracy," Commentary 45 (Jan., 1968), 36-44.

34. Milton Himmelfarb, "Secular Society? A Jewish Perspective," Daedalus 96 (Winter, 1967), 223.

35. James Steve Counelis, "The American Curriculum and Intellectual Religious Liberty," Orthodox Observer 30 (May, 1964), 145-146.

36. Littell, "Sectarian Protestantism," p. 66.

37. Marshall D. Herron, "The Nature of Scientific Inquiry," School Review 79 (Feb., 1971), 171-212; Byron G. Massialas, Nancy Freetag Sprague, and Jo Ann Sweeney, "Traditional Schools, Parochial Pedagogy," School Review 79 (Aug., 1971), 561-78.

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38. See, for example, Urie Bronfenbrenner, "Freudian Theories of Identification and Their Derivative," *Child Development* 31 (March, 1960), 15-40; Wayne Gordon, *The Social System of the High School* (Glencoe: The Free Press of Glencoe, 1961); Caroline M. Tryon, "The Adolescent Peer Culture," in *Adolescence*, Forty-third Yearbook of the National Society for the Study of Education, Part I (Chicago: University of Chicago Press, 1944), pp. 217-239; James S. Coleman, *The Adolescent Society* (Glencoe: The Free Press of Glencoe, 1961).

39. Coleman, *The Adolescent Society*.

40. Bernard C. Rosen, "Conflicting Group Membership: A Study of Parent-Peer Cross-Pressures," *American Sociological Review* 20 (April, 1955), pp. 155-161.

41. Morris Rosenberg, "The Dissonant Religious Context and Emotional Disturbance," in Louis Schneider, ed., *Religion, Culture, and Society: A Reader in the Sociology of Religion* (New York: John Wiley & Sons, 1964), pp. 549-559.

42. Benjamin S. Bloom, "Stability and Change in Human Characteristics: Implications for School Reorganization," *Educational Administration Quarterly* 2 (Winter, 1966), 46.

43. Annie Stein, "Strategies for Failure," *Harvard Educational Review* 41 (May, 1971), 158-204.

44. E.g., Gintis, "Towards a Political Economy"; Michael B. Katz, *Class, Bureaucracy and Schools* (New York: Praeger, 1972); Reimer, *School Is Dead*, p. 64; Colin Greer, *The Great School Legend* (New York: Basic Books, 1972); Illich, *Deschooling Society*.

45. Peter Schrag, *The Decline of the Wasp* (New York: Simon and Schuster, 1982); Michael Novak, *The Rise of the Unmeltable Ethnics* (New York: Macmillan, 1972).

46. Gordon, *The Social System*; Tryon, "The Adolescent Peer Culture"; Coleman, *The Adolescent Society*.

47. E.g., Clemmont E. Vontress, "The Black Muslim Schools," *Phi Delta Kappan* 47 (Oct., 1965), 86-90; Michael Parenti, "The Black Muslims: from Revolution to Institution," *Social Research* 31 (Summer, 1964), 180-83.

48. *Ibid*.

49. Note, for example, the following suggestion in Robert M. Hutchins, "Toward a Learning Society: The Institutional Illusion," *National Elementary Principal* 51 (October,

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1971), 36-40: "The electronic devices now available can make every home a learning unit, for all the family. All the members of the family might be continuously engaged in learning. Teachers might function as visiting nurses do today--and as physicians used to do. The new electronic devices do not eliminate the need for face-to-face instruction or for schools, but they enable us to shift attention from the wrong question, which is--How can we get everybody in school and keep him there as long as possible--to the right one, which is--How can we give everybody a chance to learn all his life? The new technology gives us a flexibility that will encourage us to abandon the old self-imposed limitations: that education is a matter for part of life, part of the year, or part of the day, that it is open in its richness only to those who need it least, and that it must be conducted formally, in buildings designed for the purpose, by people who spend their lives in schools, in accordance with an incomprehensible program, the chief aim of which is to segregate the sheep from the goats." (p. 39).

50. Erickson, Public Controls, pp. 174-75.

51. Littell, "Sectarian Protestantism and the Pursuit of Wisdom," ibid., p. 70.

52. Ibid.

53. Robert Alter, "A Fever of Ethnicity," Commentary 53 (June, 1972), 68.

54. Ibid.

55. Nathan Glazer, "The Limits of Social Policy," Commentary 51 (Sept., 1971), 51-58.

56. Urie Bronfenbrenner, "Reunification with Our Children," Inequality in Education, No. 12 (July, 1972), 10-20. Basically the same view is presented in Douglas H. Heath, "Student Alienation and School," School Review 78 (Aug., 1970), 515-28.

57. Bronfenbrenner, "Reunification with Our Children," p. 17.

58. Fein, "The Limits of Universalism."

59. Novak, The Rise.

60. Hostetler and Huntington, Children in Amish Society.

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61. James S. Coleman, "The Children Have Outgrown the Schools," Psychology Today, Feb., 1972, pp. 72-82.

62. Conant, "Private and Parochial," 49.

63. David B. Tyack, ed., Turning Points in American Educational History (Waltham, Mass.: Blaisdell Publishing Co., 1967), p. 122.

64. Anderson, "State Education," p. 243.

65. For a discussion of relevant studies, see Donald A. Erickson, "Contradictory Studies of Parochial Schooling: An Essay Review," School Review 75 (Winter, 1967), 425-36.

66. West Va. State Bd. of Educ. v. Barnette, 318 U.S. 624 (1943).

67. Justice William O. Douglas, quoted in Robert Michaelsen, Piety in the Public School (New York: The Macmillan Company, 1970), p. 58.

68. See, for example: Robert N. Bellah, "Civil Religion in America," Daedalus 96 (Winter, 1967), 1-21; Will Herberg, Protestant, Catholic, Jew (rev. ed.: Garden City, N.Y.: Anchor Books, 1960); Michaelsen, Piety in the Public School.

69. Bellah, "Civil Religion in America," p. 9.

70. Ibid., p. 11.

71. Ibid.

72. Michaelson, Piety in the Public School, p. 46.

73. Ibid.

74. Ibid., quoting an incompletely described report by the Educational Policies Commission of the National Education Association, titled Moral and Spiritual Values in the Public Schools, pp. 6, 54.

75. Quoted in Tyack, Turning Points, p. 149.

76. Quoted in Lawrence A. Cremin, The Transformation of the School (New York: Vintage Books, 1961), p. 68. Also see Tyack, Turning Points, chapter 7.

77. Charles F. Marden and Gladys Meyer, Minorities in American Society (2d ed.; New York: American Book Company, 1962), p. 30.

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78. Marcus Lee Hansen, "The Third Generation," in Oscar Handlin, ed., *Children of the Uprooted* (New York: George Braziller, Inc., 1966), p. 255; Joshua A. Fishman, "The Historical and Social Contezts of An Inquiry Into Language Maintenance Efforts," in Fishman, ed., *Language Loyalty in the United States* (The Hague: Mouton & Company, 1966), p. 256.

79. Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt & Company, 1920), pp. 22-23; Hans Kohn, *American Nationalism* (New York: Collier Books, 1961), p. 155.

80. Cited in Oscar Handlin, ed., *Immigration as a Factor in American History* (Englewood Cliffs, N.J.: Prentice-Hall, 1959), pp. 143-144.

81. Quoted, *ibid.*, p. 156.

82. See, for example; Stein, "Strategies for Failure"; Victor G. Cicirelli, "Educational Models for the Disadvantaged," in Herbert J. Walberg and Andrew T. Kopan, eds., *Rethinking Urban Education* (San Francisco: Jossey-Bass, 1972), pp. 31-48; Michael B. Katz, *Class, Bureaucracy and Schools: The Illusion of Educational Change in America* (New York: Bantam Books, James Herndon, *The Way It Spozed to Be* (New York: Praeger, 1972); 1969); Jonathan Kozol, *Death at an Early Age* (Boston: Houghton Mifflin Company, 1969); Rosalie H. Wax, "The Warrior Dropouts." *Transaction* (May, 1967), pp. 40-46; Christopher Jencks, "Private Schools for Black Children," *New York Times Magazine*, Nov. 3, 1968; Charles A. Valentine, "Deficit, Difference, and Bicultural Models of Afro-American Behavior," *Harvard Educational Review* 41 (May, 1971), 137-57; Diana Mack Drake, "Anglo American Teachers, Mexican American Students, and Dissonance in Our Schools," *Elementary School Journal* 73 (January, 1973), 207-12.

83. Theodore Roszak, *The Making of the Counterculture* (New York: Anchor Books, 1969); Charles Reich, *The Greening of America* (New York: Bantam Books, 1970); Michael Rossman, "How We Learn Today in America," *Saturday Review*, Aug. 19, 1972, pp. 27-29.

84. Novak, *The Rise*, pp. 229-30.

85. Alter, "A Fever of Ethnicity," p. 71.

86. David K. Cohen, "Pluralism in the United States: Section B: Uncommon Schools and the Common Culture," in Donald A. Erickson and George F. Madaus, *Issues of Aid to Nonpublic Schools: Vol. I: Economic and Social Issues of Educational Pluralism* (Washington, D. C.: President's Commission on School Finance, 1971), pp. IV:B:7 - IV:B:9.

CHAPTER 3

UNSTATED REASONS FOR PROGRAMMATIC CONTROLS*

We have noted that state legislatures place surprisingly extensive reliance upon the most liberty-endangering controls of all in education--upon "programmatic" controls, which prescribe the processes by which all children must be reared during the extensive periods when school attendance is mandatory. Little apparent attention is given to other ways of fulfilling the state's regulatory role. In the analysis presented in chapter 2, we were unable to find any compelling justification for these programmatic controls. The possibility must be investigated, then, that such controls perform "hidden," "latent," or generally unrecognized functions in our society, or are to some extent historical accidents.

One possible unstated function relates to our earlier discussion of the "hidden"curriculum. Numerous writers allege, often in fairly persuasive terms, that the most fundamental reason why children are required to attend conventional schools is found in the generally implicit demand that all children must be socialized to viewpoints, attitudes, and patterns of behavior that will help preserve the current social order.[1] By being forcibly subjected to the life style of the conventional school, as this argument goes, children learn to observe the norms of our society in virtually automatic, unquestioning terms.

We are inclined to think, however, that a more promising central hypothesis for explaining the prevalence of programmatic controls relates to the efforts of organized educators, over many decades, to promote the status and security of their occupational group (by attempting to ensure a steady demand for their services and simultaneously to control access to the profession, for example)--efforts that may have been

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significantly abetted by numerous historical accidents.

It seems unfortunate that no historian of note, so far as we can determine, has scrutinized systematically the ways in which self-aggrandizement by educators may have distorted efforts to make educational opportunities available as equitably, effectively, and efficiently as possible. The present chapter does not purport to provide such a historical analysis, but merely to sketch out some major factors needing examination. We think the available evidence suggests strongly, even if not conclusively, that the "tyranny of the expert" has been a major force in education, as in other spheres of American life.

Bailyn complains that too much attention has been given to distorted educational histories, "the patristic literature of a powerful academic ecclesia."[2] He alleges that one highly influential educational historian seemed determined, not to discover the most logical interpretation of past events, but "to dignify a newly self-conscious profession, education."[3] Similarly, Cappon asserts that "the history of American education . . . has suffered at the hands of specialists who, with the development of public education at heart, sought historical evidence to strengthen their 'cause.'"[4]

The most relevant scholarly work, in terms of our "self-aggrandizement" hypothesis, has been done by an economist, E. G. West, who has reexamined historical evidence in England and New York State, supplemented at times by more limited data from other areas.[5] At the heart of West's analysis is a theory which states that, since efforts to produce political influence are costly in terms of money, effort, and time, we should expect these attempts to be made chiefly by the people who will reap the greatest benefits. Those who earn their paychecks in schools and other service enterprises run by government

> can afford to bring greater than average influence to bear upon government policy since their incomes will be particularly responsive to it. In contrast, the

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> consumers, having interests which are spread over many products and services, cannot so afford to buy influence over the supply of only one of them. In particular, they will not be able to afford the information necessary to evaluate the full implications of government policy such as, for example, the true incidence of taxation necessary to pay for "free" services or the eventual effects of a "free" service upon consumer choices.[6]

In education and other public service institutions it is predictable, in terms of West's theory, that organized professionals will have a powerful and even misleading effect on public opinion, will exercise a disproportionate influence on lawmakers, and will frequently promote legislation that does more for the providers than for the recipients of public services.

In England and New York, West argues, the state began developing universally available, tax-supported public schools at a time when there was no evidence that the majority of parents were unwilling or unable to secure sufficient education for their children. Some parents were too poor to make a decent education available, and many more were hindered by geographic factors. But instead of responding to these particular needs, the state (influenced to a marked degree by leading educators) began developing state-supported, state-operated schools in all areas. For a time these schools, though subsidized, were free only to the very poor. Most parents had to pay fees (then known as "rate bills"). But problems involved in the collection of these fees often delayed full payment of teacher salaries by several months. In response, educators demanded that the schools be made available to everyone without payment of fees, even though other reforms might well have eliminated the problems without financing publicly sponsored education entirely through taxation. In apparent reaction to the new taxation requirements, many citizens worked to keep school expenditures down. When taxation

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mechanisms did not produce as much money as a combination of taxes and private investment had once done, many schools began operating for only four months per year instead of eight, as previously. The new laws, intended to increase the supply of available schooling, had actually reduced it.

However, the employees of public schools were well on the way toward their objective, from West's viewpoint--to ensure, by placing a financial penalty on private school attendance, that most children by far would go to the public schools. By this means, public school teachers and administrators would be assured a steady demand for their services. (Public school personnel had been seriously concerned for years about competition from nonpublic schools.) As tax support of public schools increased, the proportion of children enrolled in nonpublic schools decreased. In the meantime, educational leaders made extensive efforts to persuade the general public that nonpublic schools were inherently undemocratic, deserving no support or encouragement from government.

As their next step, according to West, professional educators acted to restrict the freedom of parents to select favorite public schools in preference to other public schools within geographic reach, and to withdraw their children from school at an earlier age in areas where all available schools seemed inferior. Strong efforts were launched to make attendance compulsory, though the state superintendent of schools insisted that the primary cause of poor attendance was bad teaching, and to require all children to attend whatever schools fell within specified "attendance areas." Before long, "compulsory payment and conpulsory consumption had become mutually strengthening monopoly bonds and the pattern of schooling for the next century had been firmly set."[7] At no point, West emphasizes, were the new policies of compulsion supported by sufficient evidence.

In an analysis by Landes and Solmon, several parts of West's thesis are emphasized further.[8] Landes and Solmon suggest, for example, that self-aggrandizement by teachers and educational compulsion were mutually reinforcing. As more and more persons were compelled by the combination of taxation and compulsory attendance laws to purchase educational services in the public sector, the pool of public educators became larger and larger. And as the pool of people interested in educational compulsion increased, there was ever more likelihood that the compulsion would be extended. Furthermore, as time went on, most citizens would become accustomed to state schooling, and the resistance to compulsion would probably decline.

West also discusses the paradox that universal regulation may be more likely when few parents need to be regulated than when many parents need to be regulated. Attempts to make most people do what they are unwilling or reluctant to do will be politically unpopular, whereas there will be little resistance to universal compulsion when nearly everyone is already doing what the state seeks to compel. In the case of compulsory school attendance, for example, the majority will assume that the controls are intended merely to keep a recalcitrant minority in line. West elicits figures to suggest that education was virtually universal, wherever reasonably available in England and the United States, before compulsion was introduced. Along with public financing and operation of tuition-free schools everywhere, compulsory attendance laws functioned, according to West's interpretation, mainly to establish monopolistic conditions in education that promoted the status and welfare of the teaching profession.

Examining a more recent period in American history, Cibulka suggests that Progressivism, particularly in the context of mass immigration and political corruption, may have facilitated the struggle of teachers and administrators to maximize their own status and power, and thus, in effect, to minimize the discretionary rights of students and parents in education.[9] The possibility is directly relevant to our analysis of state controls in education, since one fundamental rationale for these controls inheres in the idea, discussed in chapter 2, that educational decisions should be left up to the professional. In addition, we must remember that the powers of local public school boards are derived entirely from the state. Consequently, arrangements that grant educational experts at any level extensive power to over-ride parental preferences are a manifestation of state control; in essence, the state has designated certain people to act in its behalf in determining what child-rearing practices are best. And by means of vague or specific requirements that nonpublic schools must be "equivalent" to public schools, even the private educational sector is affected.

It was probably during the Progressive era that the elitism of the professional educator was shaped into its present ideology--the fear of pressure groups, the abhorrence of controversy and conflict, the conviction that expertise should dominate the popular will. Progressivism was essentially a platform to reassert political power. Its supporters were primarily Protestant and nativist--an amalgamation of the old gentry who felt displaced by the growing ethnic political machines on the one hand, and on the other hand former Populists who had lost their political support in the 1890's. This political alliance restated the old nineteenth-century conflict between the rights of the people, a theme of the political left, and the responsibilities of expert civil servants, a platform pressed until then by segments of the political right. Progressives sought to restore faith in the principle of popular sovereignty by giving experts a greater role in raising the level of public discourse and having them advance communication and understanding among the various ethnic groups in our cities.[10] Experts were to recast the parochial attitudes of the citizenry and make them compatible with the requirements of a modern technological nation. Experts were to convert private wants into a public spirit and a public interest. Professionalism would bring a new respect for rational discussion rather than pressure-group politics, a new commitment to public needs rather than personal motives. It is these ideas, which grew up in response to the excesses of the Gilded Age, which apparently continue to be the dominant frame of reference for the educational profession now presiding to a marked degree--as an agent of, and advisor to, the state--over our elementary and secondary schools.

The "professionalization" of American educators apparently was part of the more conservative business and Mugwump logic within Progressivism. The public interest was served best, according to that logic, by reducing rather than expanding the scope of public involvement in governmental decisions. In the case of public education, local decisions would be made by a superintendent and professional staff whose specialized knowledge surpassed the partisanship and ignorance of laymen. The top educational executive was to be powerful enough to remain strictly neutral among all the special interests of society. He would defend the common public interest against all self-seeking partisans. Thus the will of the expert became confused with the "public interest."

John Dewey, the major exponent of Progressive Education, saw the expert as playing a prominent role in identifying and promoting community interests. The professional educator would use his special knowledge and skill to identify the public interest, aggregating competing interests into his superior vision.[11] Dewey provided no standards (either substative or procedural) to distinguish "the public interest " from a multitude of special interests. Dewey also seemed oblivious to the previously mentioned tendency of the expert to promote his own interests.

It is not clear to what extent Dewey's ideas influenced educational administration or to what extent he merely mirrored larger themes in the Progressive movement which found their way into administrative doctrines. Either way, Progressivism apparently provided fertile ground for promoting the concept of the autonomous expert in education. Cremin notes, however, that the public school reform movement was isolated from the broader Progressive movement, for in education "professionalism ultimately divorced the movement from the lay power necessary to sustain it. . . ."[12]

Efforts to make the expert autonomous in education probably were significantly aided by reactions to massive immigration. Many controls for nonpublic schools, including some that were struck down by the Supreme Court, may be traced to the fear that the United States would be Balkanized into a collection of foreign enclaves.[13] During the post-bellum decades the political right in America, particularly business, became concerned over labor unrest then occurring in our cities and over the rising threats which they felt immigrants posed. With much support from educators, they asked the newly established public schools to socialize immigrants into American culture and to give them skills and habits which would make them productive workers in the new industrial economy rather than malcontents and revolutionaries. William Torrey Harris, who was superintendent of schools at St. Louis from 1867 to 1906 and profoundly influential nationally, epitomized this tendency to use the public schools for economic purposes and, ultimately, for political suppression, as Merle Curti has forcefully observed:

> Harris not only defended capitalism against its critics, but explicitly pointed out how education might serve more effectively the established order.

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> In greeting the National Education Association in 1894, when the country was in the throes of labor "disorders," he observed that the school provided the people with training in those habits of regularity, silence, and industry which would "preserve and save our civil order." In the public school, the center of discipline, the pupil learned "first of all to respect the rights of organized industry." In the kindergarten the child of the slum, the weakling of society, learned self-respect, moral ideals, industry, perseverence....
>
> Who can say how far the reluctance of Americans to experiment seriously with social control, to abandon traditional laissez-faire individualism, in spite of its patent contradiction by harsh facts, was related to the skill and plausibility with which Harris told two generations of Americans what they already believed, and what they wanted to believe? Who can estimate the influence of Harris in standardizing the school system...and excluding from its curriculum and its methods everything that did not confirm the existing economic and social structure?[14]

Michael Katz also contends that our current public school systems were shaped by an alliance between educators and social conservatives, whose "incipient bureaucracy" triumphed over rival models of universal education in the mid-nineteenth century.[15]

Further fuel for the "professionalization" of schooling was provided by the virtual takeover of school systems in many cities by political machines. With the rise of these political machines, city school systems became highly politicalized, susceptible to logrolling and graft. Progressives proposed to remove political influences on the schools by constituting education as a legally independent function and by instituting city-wide election of board members so that these board members would be responsive to broader constituencies than local neighborhoods.[16] But the ideal of separating "education" from "politics" also served professional interests. It was interpreted to require the "neutral" adminstrator to discover the public interest unfettered by the competing claims of local feifdoms. It gave him greater latitude to create a consensus around his conception of the public interest via communication with the public. Thus Dewey asks the school superintendent to make the public understand "the needs and possibilities of the creative education of the young." Public education was essentially the education of the public, said Dewey. In fact, Dewey adopts a patronizing, even suspicious attitude toward the public. He advises the school superintendent not to weigh himself down with parental complaints. The school administrator must enlighten the public, mainly through his influence upon students and teachers.

Some educational leaders of that period went even further in denigrating the popular will. Consider Charles Judd of the University of Chicago, viewed as a reformer among administrators. Judd argued for the abolition of school boards because he believed their members were either uninformed or scoundrels. Schooling had become so complicated, he asserted, that ordinary laymen could no longer decide what ought to be included in the curriculum, let alone what methods of teaching were appropriate. The inclination of board members to interfere with constructive professional policies, Judd said, served to disguise corruption by political bosses. The net effect of Judd's notion would have been to remove the public entirely from participation in educational decisions. Judd wanted experts--individuals qualified by specialized knowledge rather than by the virtue or intuition of the people--to rule in the people's interest.

This trend was surreptitious, however, because on the popular scene professionalism sometimes appeared to be in alliance with populist sentiment. In Chicago, for example, the Save Our Schools Committee, a citizens reform group, appealed to fellow citizens to wrench control of the schools from the mayor, conservative businessmen, and those professionals within the system who paid his machine homage. This populist group relied on the principle of popular sovereignty; they appealed to the moral judgment of the public and hoped to enlist public spirited citizens to serve on the Board.[17] But at that point in American history, it was still plausible to identify the autonomy of the expert with the will of the people. The tension within the reform movement, namely public versus professional sovereignty, had not yet erupted.

The above-discussed emphasis upon the expert's central role in the governance of American public schools has created some major problems for our society. In the first place, several commentators have argued that it is by no means self-evident what is the public interest. These commentators have even suggested that the concept of a public interest should be discarded altogether because neither the public nor political scientists have been able to reach clear consensus on what the concept actually means.[18]

The extent to which our body politic embodies significant cleavages over conceptions of the community and over who shall rule is well documented by political scientists. At least nine political ideologies are prevalent in the United States. For example, Agger, Goldrich, and Swanson cite an important source of disagreement between public officials of community conservationist persuasion and those who hold liberal beliefs:

> Liberals see racial minorities and even small businessmen as disadvantaged interests. Liberals want public officials to accord the needs of the disadvantaged the highest political status. These needs will be defined by the leaders of the disadvantaged. Community conservationists want public officials to be accorded the highest political status by all interests, including the disadvantaged.[19]

Insistence by professional educators on the primacy of their own role, on a particular style of public discourse, and

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on a particular body of content for the school curriculum may have drastically lessened the pluralism which supposedly characterizes education in America. Our myth of local control notwithstanding, the educational profession has imposed a remarkable uniformity, as we noted earlier. Whereas in European countries public schools usually have served the needs of the nation-state through a formal centralization of power, a similar effect may be achieved here through quite opposite means. America may have nationalized its schools through controls that enforce the ideas of its educational profession rather than through explicit national policies. Our educational professionals have been vocal guardians, as well as architects, of a national interest. While we have been vigilant in protecting education against the misuses of political power which have sometimes characterized European public education, we have been less cognizant of the potential excesses of a professional elite.

A further possibility needing investigation by historians is that, when many child-rearing functions were transferred from the home and immediate community, apparently under conditions of unusual stress,[20] there was little realization that child-rearing functions per se had indeed been transferred. Even today, the opinion investigated at length in chapter 2 seems widespread--that schools are simply neutral containers within which certain essential understandings, skills, and attitudes "that we all hold in common" are fostered. Citizens possessed of this viewpoint are not likely to be on guard against state dictation of child-rearing processes, so long as the intrusions are accomplished in places called "schools." And the acquiescence of many parents in the transfer of discretionary power over child-rearing practices was probably facilitated by the widely promoted ideals of a liberal education which, as we have seen, are generally interpreted to demand that schools be kept somehow more "neutral" than homes and local communities can be expected to be.

The growth of programmatic controls may have been facilitated, further, by the fact that relatively powerless, often pacifistic groups (such as the Amish) have often been the only people to feel the sharp brunt of these controls. Since programmatic controls are geared to the life style of the cultural mainstream, most Americans are unlikely to view them as hostile. And if the people sensing hostility had little disposition or power to make a national commotion, the proponents of the programmatic controls would have little significant resistance to overcome. Roman Catholics have been a major exception in this regard. When persecuted, they responded vocally and powerfully. But they were preoccupied with religious prejudice of a particular kind. Once the public schools ceased to be militantly Protestant, most Catholics apparently assumed that general neutrality had been achieved.

Finally, since schools have been notoriously ineffective instruments of indoctrination thus far (with the exception of the apparent power, mentioned in chapter 2, to wreak havoc on minorities not caught up in the cultural mainstream), the coercive potential of programmatic controls has not yet been widely recognized. Furthermore, though the principle is widely accepted that the state may go very far indeed in dictating the educational experiences to which all children must be exposed, state legislatures and administrative agencies have thus far exercised restraint, though blatant violations of liberty have occurred from time to time (e.g., in the case of the Jehovah's Witnesses and the Old Order Amish). But in the future, if educators learn how to construct more powerful instructional systems, and if the states intensify their programmatic grip on schools, liberty may be threatened much more obviously.

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As we stated at the beginning of this chapter, we have not attempted to provide a thorough historical analysis, now badly needed, of reasons for the widespread acceptance of state programmatic controls in education. Rather, we have sketched out several plausible hypotheses, some of which are already supported by some evidence. We find these hypotheses more than mildly plausible, however. They are ample ground for asserting that any careful student of American educational history can easily explain, be means of several appealing interpretations, why we have a system of educational controls in the United States that cannot logically be reconciled with our purported commitment to freedom.

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Notes to Chapter 3

1. Supra, chapter 2, pp. 2/11 - 2/13, 2/37 - 2/38.

2. Bernard Bailyn, Education in the Forming of American Society (Chapel Hill, N. C.: University of North Carolina Press, 1960), p. 8.

3. Ibid., p. 7.

4. Lester J. Cappon, "Foreword," ibid., p. viii.

5. See, for example, E. G. West, Education and the State (London: The Institute of Economic Affairs, 1965); "The Political Economy of American Public School Legislation," Journal of Law and Economics 10 (Oct., 1967), 101-128; Economics, Education and the Politician (Hobart Paper 42; London: The Institute of Economic Affairs, 1968); "The Uneasy Case for State Education" (pamphlet; Wichita, Kans.: Center for Independent Education of Wichita Collegiate School, n.d.); "The Economics of Compulsory Education" (prepublication manuscript, 1972).

6. West, "The Political Economy," p. 114.

7. Ibid., p. 127.

8. W. M. Landes and L. C. Solmon, "Compulsory Schooling Legislation: An Economic Analysis of the Law and Social Change in the Nineteenth Century," Journal of Economic History (March, 1972), Sec. III.

9. James G. Cibulka, "Administrators as Representatives: the Role of Local Communities in an Urban School System" (Ph.D. dissertation, Department of Education, University of Chicago, 1973).

10. Rush Welter, Popular Education and Popular Thought in America (New York, N.Y.: Columbia University Press, 1962), pp. 263-66.

11. John Dewey, The Public and Its Problems (New York: Henry Holt and Co., 1927), pp. 76, 146-47.

12. Lawrence A. Cremin, The Transformation of the School (New York: Vintage Books, 1961), p. 185.

13. Supra, chapter 1, pp. 1/14 - 1/16.

14. Merle Curti, The Social Ideas of American Educators (Totown, N.J.: Littlefield, Adams and Company, 1967), p. 349.

15. Michael Katz, *Class, Bureaucracy, and Schools: The Illusion of Educational Change in America* (New York: Praeger, 1971).

16. George Counts was an exception. He asked for a franker recognition of interest group representation on school boards. See George Counts, *School and Society in Chicago* (New York: Harcourt, Brace, & Co., 1928), p. 357.

17. For a succinct history of the Citizens Schools Committee, see "Chicago Citizens Fight Kelly School Corruption," *Better Schools*, (May, 1959), p. 13.

18. Glendon Schubert, *The Public Interest* (Glencoe, Ill.: The Free Press of Glencoe, 1960), pp. 223-24. Also see Virginia Held, *The Public Interest and Individual Interests* (New York, N.Y.: Basic Books, 1970).

19. Robert E. Agger, Daniel Goldrich, Bert E. Swanson, *The Rulers and the Ruled* (New York: John Wiley and Sons, 1964), p. 21.

20. Bailyn, *Education in the Forming*.

CHAPTER 4

LEGAL DIMENSIONS OF THE STATE REGULATION OF NONPUBLIC SCHOOLS

by

John Elson

INTRODUCTION

When the state applies legal controls to the nonpublic school, a potential for conflict is guaranteed by the antithetical social roles played by the law and the nonpublic school. The law requires those who fall under its jurisdiction to conform to an established standard; freedom of action is confined within the limits of that standard. The nonpublic school requires freedom to create its own independent identity. If it cannot innovate and continually provide alternative programs to those of the public schools, it has no significant role in society and little chance for success. Nevertheless, when a prosecutor, judge, or other public official must decide whether a particular practice violates a legal standard, he interprets the meaning and application of the statutory language in terms not of potentials, but of precedents, of what administrators or courts have allowed in the past. Arguments of reason and of analogy may often be convincing; even pleas for trust and patience may occasionally have their effect.

But it is clear that when novel practices are the subject of legal attack, the qualities of innovation and creativity become liabilities in the eyes of those who decide when the law is violated. Since nearly every state legislature has felt a need to enact some checks on the freedom of nonpublic schools, the conflicts have been frequent and irreconcilable, with the courts often acting as the final arbiter.

To avoid having the law's inevitable rigidity and recourse to precedent stifle the nonpublic school's capacity for innovation, nonpublic school regulation must be undertaken with an understanding of both what state interests require protection from uncontrolled nonpublic schools and what types of regulation will protect these interests without unnecessarily infringing upon the nonpublic schools' autonomy. In addition to the educational policy considerations set out by Professor Erickson which are fundamental to such an understanding, consideration should also be given before proposing a regulatory scheme to the following areas of legal analysis, which are the subject of this paper: (1) the basis in law for state intervention in nonpublic school affairs; (2) the legally recognized state interests in nonpublic school regulation; (3) the constitutional protections nonpublic schools have against state interference; (4) the nature of nonpublic school regulation in Illinois and a brief comparison to other states; and (5) legal dimensions of two alternatives to the present forms of nonpublic school regulation.

I

LEGAL BASIS FOR STATE INTERVENTION IN NONPUBLIC SCHOOL AFFAIRS

The nonpublic school, provided it is not funded or chartered by the state, has the same protections against governmental interference as private businesses and property owners have in general.[1] "Under our form of government," observed the Supreme Court, "the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference."[2] This freedom is protected against state action by the fourteenth amendment's guarantee that "no State shall. . . deprive any person of life, liberty or property, without due process of law. . . ." This amendment, however, does "not prohibit governmental regulation for the public welfare."[3] Rather, "the guarantee of due process demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[4] Individual liberty is never infringed upon by a "regulation which is reasonable in relation to its subject and is adopted in the interest of the community. . . ."[5]

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[1] 68 Am. Jur., Schools §309 (1973).

[2] Nebbia v. New York, 291 U.S. 502, 503 (1933).

[3] Ibid., at 525.

[4] Ibid.

[5] West Coast Hotel v. Parish, 300 U.S. 379 (1937).

Since the 1930s the United States Supreme Court has made it clear that federal courts will give state regulatory legislation an almost irresistible presumption of validity. In the 1937 Carolene Products case the Court ruled that "/J/udicial inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts known or which could reasonably be assumed affords support for it."[6] In the 1952 Day-Brite Lighting case the legislative discretion was given its widest scope: "Our recent decisions make it plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy it expresses offends public welfare."[7]

State courts differ widely in interpreting the degree of public benefit that must be shown in order to validate governmental interference with nonpublic schools. North Carolina strictly limits private school controls to instances in which "there is a manifest present need which affects the health, morals, or safety of the public generally. . . ."[8] But a New York court found the state's right to regulate nonpublic schools inherent in the function of education, stating it to be "an indisputable fact that all schools, public or private, are affected with a public interest and hence subject to reasonable regulation under the police powers of the state."[9] Under this more common view, state courts will presume a nonpublic school regulation to be in the public interest and will not strike it down unless it is clearly unreasonable, regardless of whether it fulfills a "mainfest present need."

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[6] United States v. Carolene Products Co., 304 U.S. 144,154 (1938).

[7] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421,423 (1952).

[8] State v. Williams, 117 S.E. 2d 443 (N.C. 1960).

Although Illinois appellate courts have not ruled directly on the constitutionality of nonpublic school regulations, it is clear that they would follow the majority view in granting such regulations a strong presumption of validity. The Illinois Supreme Court has recently set forth its standard of review in such cases as follows:

> The inquiry in due process cases has been whether the evil existed which affected the public health, safety, morals or general welfare, and whether the legislative means chosen to counter that evil were reasonable. If so, there is a proper exercise of the "elastic police power," and no want of due process, despite interference with individual property and contract rights. [Citations.][10]

The standard for resolving the question of the reasonableness of the regulatory measure's relationship to the evil to be remedied, the court went on to note, is "that the legislative discretion should not be disturbed unless it is clearly erroneous. [Citations.]"[11]

It is thus clear that there is little prospect of a successful constitutional challenge to nonpublic school regulations on grounds of "substantive due process"; that the legislative means is not reasonably related to a proper public purpose. It is easy to speculate as to clearly capricious nonpublic school regulations that would violate due process, such as a rule requiring the teaching of croquet two hours a day. Realistically, however, it would be extremely rare for a court to hold that a nonpublic school regulation does not serve a purpose within the purview of the public interest; for, as the New York court said in Packer, "[a]ll schools, public or private, are affected with a public interest,"[12] and the scope of that interest with respect to the operations of nonpublic schools is nearly all-encompassing.

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[9] *Packer Collegiate Institute v. Univ. of State of New York*, 76 N.Y.S. 2d 499, rv'd on other grounds, 81 N.E. 2d 80 (N.Y. 1948).

[10] *Chicago Real Estate Bd. v. City of Chicago*, 36 Ill. 2d 530, 541-542 (1967).

[11] *Ibid.*, at 542-543.

II

THE INTERESTS OF THE STATE IN NONPUBLIC SCHOOL REGULATION.

A. Programmatic Controls

The greatest controversy in the arguments over nonpublic school regulation has arisen over the validity of what Professor Erickson has termed "programmatic controls," or the regulation of the actual pedagogical practices of nonpublic schools. However, there is no question as to the legal validity of the state's intrusion into this area. Recently the United States Supreme Court in noting what it had recognized in an earlier decision, Pierce v. Society of Sisters,[13] stated that where there is no countervailing interest other than the parent's general interest in the nurture and education of his children, "it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age sixteen in some public or private school meeting the standards prescribed by the State."[14] Once the court assumes the validity of compulsory school attendance laws, it will without hesitation uphold laws requiring that the allowable alternatives to public schools meet certain minimum standards.[15] Without any minimum standards, the purposes of the compulsory attendance laws could be frustrated by anyone who could gather children under a sign saying "school."

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[12] Packer, supra, note 9.

[13] 268 U.S. 510 (1924).

The Illinois Supreme Court has also recognized in dicta the state's right to set minimum standards for nonpublic schools in a case in which it found that parents who had taught their children at home had complied with the compulsory attendance statute.[16] This statute exempted from the requirement of public school attendance "[a]ny child attending a private or parochial school where children are taught the branches of education taught to children of corresponding age and grade in the public schools. . . ."[17] After finding the instruction provided by the parents equal or superior to that obtainable in the public schools, the court stated:

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[14] *Wisconsin v. Yoder*, 92 S.Ct. 1526, 1542 (1972): See for fuller discussion, *infra* pp. 29-31.

[15] *In Re Shinn*, 16 Cal. Rptr. 165 (1961); *Knox v. O'Brien*, 72 A.2d 389 (N.J. Super., 1950); *People v. Turner*, 263 P.2d 685 (1953).

[16] *People v. Levisen*, 404 Ill. 574 (1950): See for fuller discussion *infra* pp. 34-36.

[17] *Ibid.*, at 578.

> In concluding that appellants have not been proved guilty of violating the statute we do not imply that parents may, under a pretext of instruction by a private tutor or by the parents themselves, evade their responsibility to educate their children. Those who prefer this method as a substitute for attendance at the public school have the burden of showing that they have in good faith provided an adequate course of instruction in the prescribed branches of learning. This burden is not satisfied if the evidence fails to show a type of instruction and discipline having the required quality and character. No parent can be said to have a right to deprive his child of educational advantages at least commensurate with the standards prescribed for the public schools, and any failure to provide such benefits is a matter of great concern to the courts.[18]

A successful challenge to nonpublic school programmatic regulations based on grounds of substantive due process of law--that they are not reasonably related to achieving a valid state interest--is nearly impossible because the state's justifications for compulsory attendance laws may also be asserted as sufficient justifications for its setting minimum standards for nonpublic schools. The justifications the state may assert for compulsory attendance are numerous, amorphous, and almost impossible to controvert. The United States Supreme Court in Wisconsin v. Yoder set forth the dual rationale for compulsory attendance of providing educational opportunities for children and of providing an alternative to child labor.[19] Because it produces an "educated citizenry" compulsory attendance has also been justified as being necessary to the maintenance of a democratic form of government and way of life.[20] An equally broad jutification for compulsory attendance laws is based on the theory that it is the natural duty of the parent to educate his child and the state, acting as parens patriae, may enforce that duty. Dicta of the United States Supreme Court support this rationale:

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[18] Ibid.

[19] Wisconsin v. Yoder, supra, note 14 at 1539.

> Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.[21]

In sum, the state, in response to a constitutional challenge to its authority to regulate nonpublic school education programs, may assert that such regulation is related to enforcing the policies underlying the compulsory attendance law. Since these policies include safeguarding the present and the future well-being of children, of the economy, and of the democratic system of government, the due process argument will fail unless the challenged regulations bear virtually no relation to serving any of these policies.

Other lesser state interests asserted in support of programmatic nonpublic school regulations are prevention of the teaching of ideas dangerous to the public order and the promotion of cultural unity among people of diverse ethnic backgrounds. Examples of laws intended to serve the former goal are New Hampshire's statute prohibiting teachers from advocating "Communism as a political doctrine or any doctrine including overthrow by force of the United States or this State" and Nebraska's law prohibiting "instruction or propaganda. . .(in nonpublic schools) subversive to American institutions and republican form of government or good citizenship."[22]

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[20] In Re Shinn, supra, note 15, at 168. Commonwealth v. Beiler, 79 A. 2d 134, 135 (Super. Ct. Pa., 1951).

[21] Meyer v. Nebraska, 262 U.S. 390, 400 (1922).

Professor Erickson has discussed the backgrounds of the three Supreme Court decisions that struck down state laws attempting to promote cultural unity through prohibiting the teaching of modern foreign laguages in *Meyer*, prohibiting nonpublic school attendance altogether in *Pierce*, and effectively putting all schools conducted in a foreign language under public control in *Farrington*.[23] As shall be discussed later in more detail, the Court's primary grounds for striking down these statutes, that they violated substantive due process of law, would probably not under present constitutional doctrine support the Court's rulings since the state could show sufficient reasonable relationship between a valid state interest and the means enacted to accomplish it. However, there can be little doubt that these laws would also be struck down now under the first amendment's guarantees of freedom of speech and religion. Similarly, the laws intended to suppress advocacy by teachers of ideas dangerous to the public order would, unless very narrowly drawn and directed to averting a real and imminent danger, also be subject to attack under the first amendment.[24]

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[22] N.H.Rev.Stat. §191.1 (1955); Rev.Stat.Neb.§79-1705 (1958).

[23] *Supra*, ch. 1, pp. 13-17. *Meyer v. Nebraska*, 262 U.S. 396, 403 (1923); *Pierce v. Society of Sisters*, *supra*, note 13; *Farrington v. Tokushige*, 273 U.S. 284 (1927).

[24] *Keyishian v. Board of Regents*, 385 U.S. 589, 603-4 (1967).

B. Nonprogrammatic Controls

Less controversial and more prevalent among the states than programmatic controls are the business, buidling, health, and zoning code provisions that apply to nonpublic schools. Just as private businesses are regulated to protect the public from unfair commercial practices, unsafe building and health conditions, or undesirable plant locations, nonpublic schools are regulated by the state and local governments under their police powers to protect the public from the same or similar dangers. Thus, the Illinois legislature has authorized comprehensive regulation of private business and vocational schools by the Superintendent of Public Instruction in order to prevent practices that are fraudulent, misleading, or in any way detrimental to the interests of the public.[25] Chapter 122, section 27-8 of the Illinois Statutes, 1972, requires that physical examinations and immunizations be given at various stages of schooling. The City of Chicago Building Code and the Zoning Ordinance contain lengthy and detailed requirements for schools of all types.[26]

Although questions are often raised about the motivations of officials for selective enforcement of this type of business and safety regulation, they are rarely invalidated for exceeding the state police power. It is interesting to note, however, that the government's power to restrict the location of nonpublic schools through zoning ordinances has been successfully challenged on constitutional grounds in several states.[27] In these jurisdictions the case law on governmental authority to enact restrictive zoning measures constitutes an exception to the broad powers courts give state and local governments to regulate private enterprise for the public welfare. Generally, however, the nonprogrammatic business and safety regulations, as well as the programmatic ones discussed above, enjoy a strong presumption of validity that is overcome only by a showing of no reasonable relationship to a valid public interest.

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[25] Ill. Rev. Stat., Ch. 144, §§136 et seq.

[26] Municipal Code of Chicago, Ch. 48-4.3 and 194A.

Another potential state interest in nonprogrammatic controls of nonpublic schools is to ensure that public funds appropriated for nonpublic school use are not spent for religious purposes in violation of the establishment clause of the first amendment. To this end the Rhode Island and Pennsylvania legislatures in attempting to aid nonpublic schools sought "to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that state financial aid supports only the former."[28] However, to ensure obedience to these restrictions the Supreme Court found that " a comprehensive, discriminating, and continuing state surveillance will inevitably be required" and "these prophylactic contacts will involve excessive

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[27] Columbia Trust v. Lincoln Institute, 129 S.W. 113 (Ky., 1910); *Roman Catholic Welfare Corp. v. City of Piedmont*, 289 P.2d 438 (Cal., 1955); but see *Yanow v. Seven Oak Park Inc.*, 94 A.2d 482 (N.J., 1953); *State v. Sinor*, 65 N.W. 2d 43 (1954).

[28] *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1970).

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and enduring entanglement between state and church," thereby violating the first amendment.[29]

Of course, not all restrictions on the use of public funds by nonpublic schools will cause unconstitutional entanglements, for, as the Court also pointed out in Lemon v. Kurtzman: "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[30] In its most recent decision on the question, the Court, over the vigorous dissent of three Justices, found no excessive government entanglements in a statute providing for the issuance of bonds to benefit a Baptist-controlled college, which would be restricted to using the funds for secular purposes and would be subject to government inspections to ensure such secular use.[31]

Finally, an interest the public may have in nonpublic school controls is that of prohibiting such schools from abridging students' civil rights. In order to invoke the fourteenth amendment's guarantees of due process and equal protection of law, there must be a judicial finding that the discrimination in question involves actions of the state and not just actions of private individuals.[32] Persuasive arguments have been made that education in itself is a public function and that private schools in doing the work of the state should be subject to the same constitutional restraints as a governmental body.[33] However, in *obiter dicta*, or language that is not binding precedent, the United States Supreme Court recently indicated that private bias in nonpublic schools is in itself not barred by the Constitution.[34] In that case, however, the Court, following a long line of precedent on what indicia of state involvement will constitute "state action" sufficient to trigger constitutional restraints, found it unconstitutional for a state to provide free textbooks to racially discriminatory private schools, holding that, "A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination."[35]

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[29] Ibid., at 619.

[30] Ibid., at 614.

[31] Hunt v. McNair, 37 L.Ed. 2d 923 (1973).

It is of interest to note that the Court has not faced a situation in which segregated private school without any tangible state support have in fact usurped to a significant degree the role of the public school system in a community.[36] Where there

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[32] The lieterature and cases on this subject are voluminous. Cf. *Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

[33] *Guillory v. Administrators of Tulane Univ.*, 203 F.Supp. 855 (E.D. La. 1962) vacated on other gds., 306 F.2d 489 (1962); see also, *Evans v. Newton*, 382 U.S. 296 (1966).

[34] *Norwood v. Harrison*, 37 L.Ed. 2d 723, 733-734 (1973).

[35] *Ibid.*, at 732.

[36] See E. Jenkins, *School Conflict in South is Intensifying as Academies Challenge Public System*, New York Times, Aug. 19, 1973 at 1, col. 3.

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is significant transfer of white students, teachers, and administrators from public to private schools and where tax support for the public system decreases while increased private funding goes to the private system, the Court might then hold that the state cannot avoid desegregation by allowing racially discriminatory, nominally private groups to assume a primary role in providing education to the community.[37] Such a holding would not be a great extension of the Court's decision in Griffin v. School Bd., where it found unconstitutional state action in the closing of the public schools to avoid desegregation and the contemporaneous establishment of segregated private schools.[38]

Instead of relying on individuals to seek judicial interpretation and enforcement of the Constitution to remedy private school discrimination, state legislatures may make such discrimination illegal. While some states for this purpose have enacted fair educational practices acts and others have included private schools in the coverage of laws prohibiting in public accommodations, one critic has concluded that these measures are not enforced and have had little, if any, impact.[39]

A significant development in the area of legislative prohibition of nonpublic school discrimination against nonwhites is the recent interpretation of Title 42 United States Code section 1981 by the Federal District Court for the Eastern District of Virginia in *Gonzalez v. Fairfax-Brewster, Inc.*[40] Section 1981 provides *inter alia* that ". . .All persons. . .shall have the same right in every State and Territory to make and enforce contracts. . . as is enjoyed by white citizens. . . ." In *Gonzalez*, which is now on appeal, the court found that the private schools in question, despite their stated nondiscriminatory policies, were in fact open to every white child and that their only criteria for exclusion was on the basis of race, so that in denying admission to nonwhites they had violated section 1981.

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[37] Segregation Academies and State Action, Note, 82 Yale L.J. 1436, 1456-1458 (1973).

[38] 377 U.S. 218 (1964).

[39] Dorson, J., "Racial Discrimination in 'Private' Schools," in Public Controls for Nonpublic Schools 144-146 (D. Erickson ed., 1969).

There are many possible reasons for the relative inaction by states in prohibiting arbitrary discrimination in nonpublic school admissions, not the least of which are lack of strong public support and the difficulty there would be in determining when nonacceptance is due to socially unacceptable reasons, such as race, or to "legitimate" reasons such as intelligence or ability to give money to the school. There is also the difficult constitutional question that would have to be confronted of whether it would violate the free exercise of religion to prohibit a religious school from discriminating racially where such nondiscrimination would conflict with the school's religious purposes. A similar conflict in principles would be posed where the racially discriminatory religious schools would compete with and to some degree supplant the desegregated public school system, so that their discriminatory policy might constitute state action in violation of the equal protection clause of the fourteenth amendment.[41] Most likely, the resolution of this conflict in constitutional principles will depend on the relative importance the Court attaches in a specific situation to the social interest served by, on the one hand, desegregated education and, on the other hand, the freedom of the school to observe its particular religious practices.

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[40] 42 LW 2077, July 27, 1973.

III

OF STATE INTERESTS, THE CONSTITUTION, AND JUDICIAL REVIEW: ARE THERE ANY LIMITS ON STATE INTERFERENCE WITH NON-PUBLIC SCHOOLS?

If a regulation has any reasonable relation to the public welfare, then under the doctrines of federal and most state courts the due process clause of the Constitution will not protect the regulated party from the state's interference. As noted above, because education is so closely identified with the welfare of society and with the state's role as ultimate guardian of the welfare of children, the state is allowed enormous discretion in regulating all aspects of education, including the operation of nonpublic schools.

Since the 1930s and cases such as Carolene Products, discussed above, the federal courts have generally abandoned the doctrine of substantive due process of law by which judges struck down regulatory measures which they believed unwarranted as a matter of policy.[42] This change in legal theory is of more than academic interest to nonpublic school educators since the three Supreme Court decisions, Meyer, Pierce, and Farrington, discussed by Professor Erickson in chapter ___, which found that nonpublic schools have both the right to exist and maintain a degree of autonomous control, were based on the theory that the challenged state regulations violated substantive due process of law. Therefore, if the protections granted by these decisions are to remain viable, they must depend on a constitutional right other than the one on which they were originally founded. In the absence of any recent Supreme Court decisions dealing directly with the constitutionality of nonpublic school regulations (except perhaps Wisconsin v. Yoder, which only adds to the uncertainty), it should be noted that analysis in this area is based more on speculation than on precedent. However, from a brief review of recent Supreme Court decisions and their relation to Meyer, Pierce, and Farrington, it is probably safe to conclude that the Court would not now limit the rights granted in these three cases and might even expand those rights under the first amendment.

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[41] See supra, text at note 37.

The Supreme Court, while viewing more expansively the state's discretion to enact measures for the social welfare, has also since the 1930s viewed far more narrowly the state's power to restrict liberties associated with speech, press, assembly, and religion guaranteed by the first and fourteenth amendments. The difference in the test that the Court applies to a challenged law when such liberties are involved was well stated by the Court in West Virginia v. Barnette:

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[42] Ferguson v. Skrupa, 372 U.S. 726, 729, 730 (1963).

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech, of press and of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. . . .[43]

In weighing the interests for and against a contested regulation the court demands that the scales fall decisively on the side of public necessity to justify any infringement of religious, political, or thought-related liberties.[44] In Barnette the public necessity of expelling students for refusing to salute the flag was held insufficient to justify the denial of the first amendment's protection of freedom of thought and belief; "neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation."[45]

In order to understand what relation this expanded first amendment protection has to the rights previously granted nonpublic schools under the abandoned substantive due process doctrine, we shall look briefly at the holdings in Meyer, Pierce, and Farrington and their interpretations in later Supreme Court decisions.

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[43] West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1942). See also Sherbert v. Verner, 347 U.S. 398, 406 (1963).

[44] Cf. Feiner v. New York, 340 U.S. 315 (1951), concurring opinion of Frankfurter, J.

[45] Barnette, supra, note 46, concurring opinion of Black and Douglas, J.J., at 643.

In Meyer v. Nebraska, the Court held that the State's interest in fostering "a homogeneous people with American ideals" by prohibiting the teaching of modern foreign languages to students below ninth grade was insufficient justification for the resulting interference with the rights of three groups: language teachers to engage in their occupation, parents to control the education of their children, and pupils to acquire knowledge.[46] Although the Court found these rights to be guaranteed under the due process clause (the first amendment then not being considered applicable to states through the fourteenth amendment's due process clause), it is clear that because the infringed-upon activities were speech-related and of no significant danger to the public they would now fall well within the protection of the first amendment.

Similarly, in Pierce, the Court did not hold it unconstitutional for the state to prohibit attendance at private school because this would violate a first amendment right to learn or teach, but because, by interfering with the private schools' patrons, it would destroy the schools' business and property.[47] Yet, the Court in dicta also discussed the parents' freedom to control their children's education in language that makes it clear that

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[46] Meyer, supra, note 24, at 401.

[47] Pierce, supra, note 13, at 535-536.

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the Court was concerned with interference with rights that are now protected under the first amendment:

> Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonalble relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all goverments in this Union repose exludes any general power of the Sate to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[48]

Finally, in Farrington a year later, the Court found that the State's restrictive foreign language school regulations, which would have driven such schools out of business, were in violation of substantive due process. The Court based this holding, as in Pierce, on the threatened destruction of the school's property interest. However, the Court emphasized the violation of the parents' right to control their children's education even more than the interference with property rights:

> They(the challenged regulations)give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books. Enforcement of the Act probably would

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[48] Ibid., at 534-535.

> destroy most, if not all, of them; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.[49]

Although it is clear that these decisions did not rest on the first amendment's protection of freedom of speech or religion, the Supreme Court in Griswold v. Connecticut and Wisconsin v. Yoder construed Meyer and Pierce as being based on first amendment principles.[50] Although Griswold concerned the existence of a constitutional right to marital privacy and its violation by a statute forbidding use of contraceptives, the Court interpreted Pierce and Meyer as providing first amendment protection against laws that "contract the spectrum of available knowledge:"

> The right to educate a child in a school of the parents' choice--whether public or private or parochial--is also not mentioned [in the Constitution or Bill of Rights]. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> By Pierce v. Society of Sisters, supra, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By Meyer v. Nebraska, supra, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment,

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[49] Farrington, supra, note 24, at 298.

[50] Griswold v. Connecticut, 381 U.S. 479 (1965); Wisconsin v. Yoder, supra, note 14.

> contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read [citation] and freedom of inquiry, freedom of thought, and freedom to teach [citation]--indeed the freedom of the entire university community [citation]. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the Pierce and the Meyer cases.[51]

This dicta of the Court is vague, and it is notable that five of the justices joined in three concurring opinions and two justices dissented. Yet, it is still significant authority for the proposition that the freedom of nonpublic schools to follow to some degree their own independent educational programs is within the scope of the first amendment's protection.

Although a Catholic school as well as a secular military academy challenged Oregon's compulsory public school attendance law in Pierce, the Court did not base its decision on, or even consider, principles of religious freedom. However, the significance of Pierce for the Court in Wisconsin v. Yoder seems to be its implied protection of the first amendment right of free exercise of religion:

> As that case [Pierce] suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. . . .However read, the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children.[52]

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[51] Griswold, supra, note 53, at 483-484.

[52] Wisconsin v. Yoder, supra, note 14, at 1532 and 1542.

In sum, although the Court has never overturned laws directly regulating nonpublic schools on first amendment grounds, dicta in recent cases leave no doubt that this amendment will offer a degree of protection for the programmatic freedom of nonpublic schools. Certainly, restrictions that would destroy nonpublic schools as in *Pierce* and *Farrington* would violate the first amendment, as would prohibitions on the teaching of subjects that present no grave and immediate danger to the public, as in *Meyer*. More difficult balancing-of-interests problems would arise in terms of certain typical existing nonpublic school regulations, such as: a requirement that nonpublic school teachers be certified to teach in public schools; that nonpublic schools devote a certain number of hours to classroom instruction; that they teach specified subjects; or that they offer courses that are substantially the same as, or equivalent to, those offerred in the public schools. The constitutionality of such regulations has regularly been upheld by state courts.[53] Yet, there is some basis for believing that a careful first amendment analysis of these regulations taking into account the Supreme Court's recent opinion in *Wisconsin v. Yoder* might lead to a different result in at least a few courts.

Yoder does seem to foreclose a challenge to the aforementioned types of nonpublic school regulations on the grounds of free exercise of religion, unless the challenger happens to be Amish or Amish-like. The Court pointed out the reasonableness and constitutionality of the state's prescribing minimum standards for nonpublic schools and it warned that courts must review such requirements with great circumspection for "courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a state's program of compulsory education."[54] Most important, the Court emphasized that the state's interest in its program of compulsory education is not subject to challenge by one whose free exercise of religion claim is based on beliefs which are recent in origin and not "shared by an organized group, and intimately related to daily living."[55] Indeed, the Court stated explicitly that probably few religious groups other than the Amish could make the type of showing of historic communal religious belief necessary to challenge successfully the state's interest in its program of compulsory education.[56]

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[53] *State v. Superior Ct.*, 346 P. 2d 999 (1960); *Commonwealth v. Bey*, 70 A. 2d 693 (Pa. 1950); *Meyerkorth v. Nebraska*, 115 N. W. 2d 595 (Neb. 1962); *In Re Shinn, supra* note 15; *Stephens v. Bongart*, 189 A.2d 131 (N. J. Juv. & Dom. Rel. Ct. 1937); *People v. Turner*, 263 P.2d 685 (Cal. Super. Ct., 1953).

Thus, the only approach left open for a substantive constitutional challenge to the aforementioned regulations is based on the first amendment rights of freedom of speech and press and the associated protections of "freedom of inquiry, freedom of thought, and freedom to teach" and the "right to distribute, the right to receive, and the right to read." [57] The first step in this approach is to show that the challenged nonpublic school regulation, whatever its other functions, also interferes with interests protected by the first amendment. Once this is shown the burden shifts to the state to show that its nonpublic school regulation serves a compelling state interest.[58]

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[54] Wisconsin v. Yoder, supra note 14, at 1543.

[55] Ibid., at 1533.

[56] Ibid., at 1543.

[57] Griswold v. Connecticut, supra note 53, at 482.

The most pervasive and inhibiting of the aforementioned nonpublic school regulations, the requirement that nonpublic school programs be equivalent to those of the public schools, has generated much case law concerning the definition of equivalence,[59] but apparently no opinions on its first amendment implications. This is also true of Illinois' similar requirement that children attending private or parochial schools be "taught the branches of education taught to children of corresponding age and grade in the public schools...."[60] Whether or not the equivalency requirement is given a strict or liberal construction,[61] it should not require a professional educator to realize that "freedom of inquiry, freedom of thought and freedom to teach" are curtailed if a nonpublic school must follow the directions of the public school in determining the nature of its academic program. The Court has clearly established that public school authorities impinge on first amendment protected rights when they restrict the freedom of public school students to express their own opinions, whether or not officially approved, as long as the business of the school is not disrupted.

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[58] NAACP v. Button, 371 U. S. 415 (1963)

[59] "Compulsory Education in the United States," 3 Seton Hall L. R. 349, 364 (1972).

[60] Ill. Rev. Stat. ch. 122, 26-1(1); People v. Levisen, supra, note 16.

[61] Because the term "equivalency" is subject to such varying interpretations and gives little guidance as to what is specifically required by it, a strong constitutional argument may be also made that it is void because its vagueness and overbreadth. Keyishian v. Board of Regents, supra note 25, and N.A.A.C.P. v. Button, 371 U. S. 415, 433 (1962).

> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.[62]

A fortiori, the state's attempt to prohibit nonpublic schools from communicating to their students what is not equivalent to the officially approved public school curriculum would also be within the realm of first amendment protection. Most important, the equivalency requirement by limiting the nonpublic school's freedom to innovate and to be different from public schools endangers its right to survive as an alternative to the public school, which right the Court has stated in interpreting *Pierce* is guaranteed by the first amendment.[63]

There should thus not be great difficulty in showing that the equivalency requirement impinges on first amendment protected freedom. The second and more difficult step in challenging the constitutionality of the equivalency requirement is that of rebutting the state's argument that its regulation serves compelling state interests, apart from its effect on first amendment rights. These interests, as noted above, are primarily those of protecting the welfare of children, and assuring an educated, politically responsible citizenry for the proper functioning of a democratic form of government.[64] This argument would seem almost irresistible in light of the Supreme Court's holding in Prince v. Massachusetts, which upheld the conviction of a child's guardian for violating the child labor laws, despite the fact that the child had been engaged in selling magazines for the Jehovah's Witnesses, an activity clearly protected by the free speech and religion clauses of the first amendment.[65] After cataloguing the various evils the child labor laws were intended to cure, the Court stated:

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[62] *Tinker v. Des Moines School Dist.*, 393 U. S. 503, 511 (1968).

[63] *Griswold, supra* note 53, *Wisconsin v. Yoder*, *supra* note 14.

> It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents' claim to control of the child or one that religious scruples dictate contrary action.[66]

The implications of Prince, however, may have been turned against the state by the Court's opinion in Yoder.[66a] There the state argued on the authority of Prince that the child's right to a secondary education and the state's power as parens patriae to assure that the child receives the benefits of that right must take precedence over the first amendment claims of the parents. The Court, however, distinguished the situation in Prince from that of the Amish:

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[64] Supra pp. 8-9.

[65] Prince v. Massachusetts, 321 U. S. 158 (1944)

[66] Ibid. at 168-169.

[66a] Supra, note 14. In Yoder Amish parents who refused to send their children to high school after completing the eighth grade were found guilty of violating the Wisconsin compulsory education statute which required regular school attendance of children between seven and sixteen years of age. The United States Supreme Court, in affirming the decision of the Wisconsin Supreme Court, reversed the parents' conviction on the grounds that the compulsory education statute as applied to members of the Amish religion who have graduated from the eighth grade violates the first amendment guarantee of free exercise of religion.

> This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence.[67]

Professor Kurland has an interesting, though extreme, reaction to this interpretation of Prince by the Court in Yoder:

> Never, I submit, has the concept of the importance of secondary education received such a blow from the judiciary. Secondary education may not be regarded by a state as essential to 'the physical or mental health of the child or to the public safety, order, or welfare' of the state. What is the justification for complusory secondary education then? How could a state ever meet the burden placed on it by the Court here to show that it has a valid interest in educating its children beyond the primary grades?[68]

It is more likely that the Court was not denigrating the general importance of secondary education, but rather was comparing it with the unique alternative education offered by the Amish, which, it concluded, safeguards the interests of the child and the public as well as does the state-approved secondary education. Whichever view is correct, the Court's language is important because it indicates that the Court may require in a freedom of speech case, as well as a freedom of religion case, that the state assume the heavy burden of showing almost beyond a reasonable doubt that its interest in specific nonpublic school regulations outweighs the interest of the regulated schools in maintaining their first amendment freedom.

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[67] Wisconsin v. Yoder, supra note 14, at 1540-1541.

[68] Kurland, P. "The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses," 75 W. Va. L. R. at 229-230 (1973).

It is useless to predict the outcome of such a balancing test apart from the facts of a specific case. It is clear that the outcome of such a challenge to the equivalency requirement would depend in part, as did the outcome in Yoder, on how the Court perceived the relative merits of the specific public and nonpublic school programs before it. However, it would be a mistake, I submit, for a court to limit, as the Supreme Court did in Yoder, the scope of its ruling that a nonpublic school regulation violates the first amendment to the narrow situation of the particular "good" nonpublic school program before the court. This would compound the basic fallacy in the approach of such restrictive nonpublic school regulations as the equivalency requirement by establishing only a new officially acceptable educational methodology.[69] The principle that needs recognition is that no educational authority can determine for all students in our society what is the appropriate method and ultimate goal of education.

Justice Jackson in West Virginia v. Barnette spoke to this point in response to the argument that educational authorities should have the discretion to choose the appropriate means to achieve national unity in order to protect the nation's security:

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[69] See infra, ch. 5.

> Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.... We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.... But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.... [70]

As Justice Jackson realized, the first amendment's prohibition against school officials requiring unified adherence to orthodox opinion is more than a matter of individual right, but is of major consequence to the society as a whole. In a recent opinion, the Court made this point even more explicit:

> The vigilant protection of constitutional protections is nowhere more vital than in the community of American schools. /Citation./ The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, /rather/ than through any kind of authoritative selection."[71]

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[70] West Virginia v. Barnette, supra note 43.

[71] Keyishian v. Board of Regents, supra note 25.

The state clearly has a legitimate interest in assuring that students in nonpublic schools attain a certain minimum standard of education clearly necessary for the welfare of the child and society. Yet there is a line that can be drawn between regulations which accomplish this goal without unnecessarily infringing First Amendment rights, and regulations, such as the equivalency requirement, which violate those rights by prescribing the methods nonpublic schools must follow and the fundamental purposes of nonpublic education. The approaches to nonpublic school regulation discussed below exemplify some alternative ways to satisfy these interests of the state and nonpublic school. Their appropriateness, however, cannot be determined apart from a consideration of the actual problems that unregulated nonpublic schools are creating in the state. Although treatment of this question is outside the scope of this chapter, it should be kept in mind that legislative acceptance of a regulatory scheme will depend primarily on whether the regulations appear to respond to a felt social need. Conversely, the best argument against acceptance of expanded governmental controls of nonpublic schools is the absence of appreciable social problems caused by uncontrolled nonpublic schools in the past.

IV

NONPUBLIC SCHOOL REGULATION IN ILLINOIS AND A BRIEF COMPARISON WITH OTHER STATES.

In Illinois, as noted above, there are numerous building, zoning, health, and commercial regulations that apply to the nonprogrammatic operations of nonpublic schools.[72] Although questions are often raised about arbitrary enforcement of such regulations,[73] their promulgation is clearly well within the state and local governmental police power.[74]

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[72] *Supra*, p. 11.

The truancy statute contains the only compulsory Illinois limitation on the educational aspects of nonpublic school operations. It exempts from public school attendance children between seven and sixteen who attend " a private or a parochial school where children are taught the branches of education taught to children of corresponding age and grade in the public schools and where the instruction of the child in the branches of education is in the English language."[75] This provision was given a liberal construction in People v. Levisen, in which the Illinois Supreme Court held that parents did not violate the truancy law by teaching their third-grade child at home.[76] The evidence showed that the parents were well educated, the child was being taught third-grade work with regular hours of instruction and study, and that the child's proficiency was comparable with average third-grade students. The court rejected the argument that individual home instruction could not be instruction in a "private school" as required by the statute and found instead that "a school.... is a place where instruction is imparted to the young, that the number of persons being taught does not determine whether the place is a school...."[77] This construction of the statute is dubious in terms of both the ordinary meaning of the term "private school" and the statute's legislative history, which shows that a prior specific authorization of home instruction had been repealed. The weight of authority from other jurisdictions is also clearly contrary to the result reached in Levisen. However, the primary significance of the opinion is in the standard it sets for determining compliance with the truancy statute:

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[73] See infra, ch. 5.

[74] City of Chicago v. Bethlehem H. T. Church, 93 Ill. App. 2d 303 (1968).

[75] Ill. Rev. Stat. ch. 122, 26-1 (1967).

[76] People v. Levisen, supra note 16.

> Compulsory education laws are enacted to enforce the natural obligation of parents to provide an education for their young, an obligation which corresponds to the parents' right of control over the child..... The object is that all children shall be educated, not that they shall be educated in any particular manner or place..... The law is not made to punish those who provide their children with instruction equal or superior to that obtainable in the public schools. It is made for the parent who fails or refuses to properly educate his child.[79]

Despite this apparent liberality in allowing alternative approaches to instruction, the court put on the parents whose child is not in public school "the burden of showing that they have in good faith provided an adequate course of instruction in the prescribed branches of learning."[80] The dourt then added this dicta:

> No parent can be said to have a right to deprive his child of educational advantages at least commensurate with the standards prescribed for the public schools.[81]

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[77] Ibid. at 576.

[78] "Private Tutoring, Compulsory Education and the Illinois Supreme Court," 18 U. Chi. L. R. 105, 106 (1950).

[79] People v. Levisen, supra note 16, at 577.

[80] Ibid., at 578.

[81] Ibid.

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When the two passages are read together, it appears that a parent may differ in his method of teaching from the public school, but the results of the teaching must be the same. Thus, although some of the court's language calls for allowance of innovation and diversity in nonpublic school education, courts could interpret Levisen as allowing little real divergence from the public school program.

This is what happened in the Appellate Court's decision in People v. Harrell, which interpreted Levisen as follows:

> Our Compulsory School Law, Ill. Rev. St. Ch. 122, Sec. 26.1 to 26.9, has received a liberal construction in Illinois courts. The term 'private school' as a lawful substitute for public schooling has been extended to include home schooling, where the teacher is competent, the required subjects are taught, and the child receives an education at least equivalent to public schooling. People v. Levisen......"[82]

The court in Harrell affirmed a conviction of parents for violating the compulsory attendance law where their children's private school was "disorganized, lacking in system, with mostly inexperienced teachers attempting to teach from textbooks without uniformity."[83]

A more recent Illinois Appellate Court opinion, however, gives a more liberal interpretation to Levisen.

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[82] People v. Harrell, 34 Ill. App. 2d 205, 207-208 (1962).

[83] Ibid., at 209.

In holding that an experimental dual enrollment, or shared-time program, did not violate the compulsory attendance law, the court in Morton v. Board of Education of City of Chicago stated:

> Since the object of the compulsory attendance law is that all children be educated and not that they be educated in any particular manner or place, part-time enrollment in a public school and part-time enrollment in a nonpublic school is permitted by section 26-1, so long as the child receives a complete education. See People v. Levisen.....[84]

The requirement that a child receive a "complete education" is so vague as to be practically meaningless, but in the context of the court's opinion it does seem to allow for more diversity in nonpublic school programs than the requirement of equivalency in Harrell.

In addition to the arguments for allowing diversity in Illinois nonpublic school programs based on the first amendment and the opinion in Levisen, reference may be made to the Illinois Legislature's declaration of policy in the Nonpublic State Parental Grant Act enacted in 1972.[85] In this Act, two of the legislative findings are:

> (5) government support of nonpublic education contributes to the pluralism of American society by enabling parents more readily to determine the kind of education that their children shall receive;
> (6) freedom to choose a nonpublic school, meeting reasonable State standards, is a fundamental parental liberty and a basic right. [86]

It is certainly reasonable to urge that a court, in interpreting the Legislature's intent in requiring nonpublic schools to teach the same branches of education as the public schools, to also consider the Legislature's declaration of the importance to pluralism in our society of safeguarding the fundamental right of parents to determine for themselves the kind of education they want their children to receive. Requiring a strict equivalency between nonpublic and public school education can only defeat this legislative policy of promoting both pluralism in society and parents' fundamental liberty reasonably to control their children's education.

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[84] 69 Ill. App. 2d 38, 45 (1966).

[85] Ill. Rev. Stat. ch. 122, 1022 (1972)

[86] Ibid.

In Illinois enforcement of the compulsory attendance law and therefore of the educational standards required of nonpublic schools is left to the local district truant officer,[87] who regularly works with the school principal in determining whether or not prosecutions should be undertaken. Nonpublic schools in Illinois are thus now in a far different position from such schools in many states in which state education agencies have been granted broad discretionary enforcement powers over nonpublic schools. Illustrative of statutes granting wide agency discretion in the implementation of nonpublic school controls is the Nebraska provision empowering the State Board of Education to "establish rules and regulations. . .and procedures for classifying, approving and accrediting schools, for approving the opening of new schools, for the continued legal operation of all schools. . . ."[88] In Massachusetts nonpublic schools in order to satisfy the compulsory attendance law must have the prior approval of the local school board which may withhold such approval when it is not "satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public school in the same town."[89]

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[87] Ill. Rev. Stat. ch. 122, §26-4 (1961).

[88] Rev. Stat. Neb. §79-328 and 79-1701 (1971).

Most nonpublic school regulatory statutes fall between these extremes in prescribing substantive standards that still require the exercise of considerable discretion in their implementation. An example of this approach is the Ohio code, which defines the criteria the state board of education must use in determining the minimum nonpublic school standards that will satisfy students' compulsory attendance requirements. It states that the board's standards "shall provide adequately for: a curriculum sufficient to meet the needs of pupils in every community. . ., efficient and effective instructional materials and equipment. . ., the proper organization and administration and supervision of each school. . ." It concludes: "In the formulation and administration of such standards for nonpublic schools the board shall also consider the particular needs, methods and objectives of said schools, provided they do not conflict with the provision of a general education of a high quality. . . ."[90]

It is interesting to note that despite their lengthy specifications, the Ohio statutory standards have apparently not provided adequate guidance. In answer to a questionnaire in 1967, the Ohio Department of Education reported that its authority over nonpublic schools needed statutory clarification, that it enforced nonobjective laws less rigorously than objective ones because of difficulties in interpretation, and that it needed a greater delegation of authority over nonpublic schools to fulfill the legislative policy.[91] Not only has the Ohio statute failed to guide administrators in fulfilling legislative intent, it also has failed to stop them from trying to exceed that intent. For, in its efforts to close down Amish schools, the Ohio Department of Education has attempted to create and enforce prohibitions that go beyond what both the legislature and state supreme court have deemed to be legal regulations.[92]

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[89] Anno. Laws of Mass., ch. 76, §1 (1971).

[90] Ohio Rev. Stat. §3301.07 (D) (1972).

This brief view of other states' approaches to nonpublic school regulation reveals a basic dilemma that cannot be avoided by states wishing to impose educational standards on nonpublic schools. On the one hand, the more specific the statutory requirement that must be satisfied by nonpublic schools, the less able some schools will be to make innovative departures from the traditional methods while the more able others will be to evade the substance and spirit of the law by purely formal adherence to its letter. On the other hand, the more general the statutory requirements and the wider the discretion of enforcement agencies to ensure that nonpublic schools do not endanger the public welfare, the less will be the influence of legislative intent and the greater the opportunity for abuse of agency discretion.

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[91] Elson, "State Regulation of Nonpublic Schools," in Public Controls for Nonpublic Schools 122 (D. Erickson, ed., 1969).

[92] State v. Glick, 175 N.E. 2d 68 (Ohio, 1961).

Broad delegations of authority to state agencies also run the risk of violating due process of law and the state constitutional requirement of the separation of powers.[93] The Illinois Supreme Court has stated the constitutional standard to be applied to legislative delegations as follows:

> . . .Statutes which are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application, have uniformly been declared unconstitutional as denying due process. . .If it leaves to a ministerial officer the definition of the thing to which it shall apply, such definition not being commonly known, it is invalid as an unwarranted and void delegation of legislative power to an administrative officer.[Citations.][94]

Nevertheless, the Illinois Supreme Court has repeatedly recognized that the legislature may delegate extremely wide discretionary authority to state agencies in order to accomplish the legislature's purpose.

> The constitutional doctrine of separation of powers was not intended to confine the legislature to the alternatives of complete inaction or the imposition of rigidly inflexible laws which would distort rather than promote its objective. When it is necessary, the legislature may commit to others the responsibility

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[93] Illinois Constitution of 1970, Article II, §1: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

[94] Rosemont Bldg. Supply v. Illinois Highway Trust Authority, 45 Ill. 2d 243, 255-7 (1970).

> for the accomplishment of the details of its expressed purpose. The scope of permissible delegation must be measured in terms of the complexity and diversity of the conditions which will be encountered in the enforcement of the statute. So it has been said almost from the outset that the legislature may authorize others to do things which it might properly, but cannot understandingly or advantageously, do itself.[95]

Even in view of this flexibility given the legislature in delegating its authority, the actual effectiveness of the recent Illinois statute conferring certain duties with respect to private schools to the newly created State Board of Education must be viewed with skepticism.[96] The Illinois Constitution of 1970 mandates the existence of such a Board which "may establish goals, determine policies, provide for planning and evaluating education programs and recommend financing" and which "shall have such other duties and powers as provided by law."[97] The new Act, which implements this constitutional provision, gives the Board all of the duties currently delegated to the Superintendent of Public Instruction and then states that "The Board shall be responsible for the educational policies and guidelines for public and private schools, pre-school through grade 12 and Vocational Education in the State of Illinois."

The Illinois Education Code does not delegate to the Superintendent of Public Instruction any mandatory controls over nonpublic

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[95] People v. Illinois Toll Highway Commission, 3 Ill. 2d 218, 233 (1954).

[96] Ill Rev. State. ch. 122,§1A4(c).

[97] Illinois Constitution of 1970, Art. X, §2.

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schools, so that the above statute is the only provision which may be construed to give a state agency such authority.[98] Yet, this provision gives the Board authority only to establish policies and guidelines for private schools; it does not require private schools to adhere to any Board pronouncements nor does it confer on the Board any authority to enforce its guidelines. Thus, regardless of constitutional considerations, as a matter of statutory construction, it is highly doubtful that under the present law the new State Board of Education can exercise any mandatory control over nonpublic schools whatever. However, it is conceivable that a court could make the dubious finding that the authority to compel nonpublic school compliance with guidelines is implied in the authority to set the guidelines in accordance with the doctrine that the legislature would not require the doing of a useless act. In such event it is likely that the Act with respect to its application to nonpublic schools would be deemed a violation of both separation of powers and due process of law since it both provides the Board with no standards whatever for applying its discretion and gives nonpublic schools regulated by the Board no basis for knowing what their rights and responsibilities are under the Act.

It may be noted, however, that, as Professor Davis has pointed out, the clear trend of the cases in many states is away from the requirement that statutory grants of authority contain standards limiting the agency's exercise of its delegated authority.[99]

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[98] Ill. Rev. Stat., 1973, ch. 122, §2-3.25 and §1-3.

[99] Davis, "A New Approach to Delegation," 36 U.Chicago L.R. 713, 726 (1969).

Furthermore, it is clear that if it were indeed the legislature's intent to give the State Board of Education power to set mandatory controls over nonpublic schools, it would be extremely easy for the legislature henceforth to add the grant of authority and the broad standards necessary to accomplish this beyond any constitutional or constructional doubt. It would therefore seem the wisest course for those concerned with protecting nonpublic schools from unwarranted governmental interference to attempt to insure that any future legislative delegation of authority over nonpublic schools provides, instead of narrow standards, safeguards against misuse of agency discretion. Even where courts require highly specific legislative standards to guide agency conduct, it is clear that agencies still have sufficient discretion to decide matters without regard to, and even in contravention of, the legislative intent.[100] Providing regulated parties with procedural safeguards, rather than legislative standards, will result in more substantial protection against abuse of agency discretion.

The choice of the appropriate safeguards depends on the type of decision an agency is making. Administrative determinations are based either on issues of policy and law that depend on general knowledge and legal principles or on issues of specific facts about specific parties that must be resolved on their individual grounds. The former type of determination, common to agency rule-making, requires different procedural safeguards from the latter type, which is common to agency adjudication. For example, when the Superintendent of Public Instruction makes a rule for teacher certification standards, the rule is based on general information that is available to and concerns all the affected parties equally. A hearing in which all parties are allowed to present unrestricted oral or written arguments is sufficient procedure for making a well-informed decision. The requirements of a trial-type hearing, including compliance with the judicial rules for admission of evidence, cross-examination, and rebuttal, would demand much more time and would not present the issues as well as straightforward arguments by the parties. Formal trial-type procedures, however, would be appropriate when the Superintendent determines whether or not a particular teacher has violated the established standards. Here, the decision depends on illuminating specific issues of fact peculiar to the activities of the individual parties, the exact function for which trial procedures are designed.

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[100] Ibid., at 722-725.

In regulating nonpublic schools a state department of education may engage in both types of determinations, making rules on the basis of broad issues of policy and law and enforcing them against individual parties on the basis of particular facts. When these parties contest enforcement there is rarely any reason why they should be denied the basic safeguards of a judicial trial, including the right to specific notice of charges; sufficient time to prepare a defense; opportunity to present evidence, to cross-examine witnesses, and to have a determination based on the record of the proceedings. There would seem to be no major problem in securing these safeguards since they are usually required as a matter of constitutional due process and to some degree by the Illinois Administrative Procedure Act.[101] Administrators should not be reluctant to accord these safeguards since they are helpful in illuminating the facts necessary for a correct decision.

The more difficult problem lies in providing safeguards against abuse of an agency's power to make comprehensive rules. As noted above, the inescapable dilemma in this attempt is that on the one hand, the rule-making discretion needed to implement legislative policy is undermined by inflexible procedural safeguards, while, on the other hand, if that discretion is not safeguarded the administrator can largely pursue his own policy, regardless of legislative intent.

It is true that the rule-making discretion of any agency is never complete. The legislature can always revoke its grant of authority and funds. Legislative committees, especially those controlling appropriations, can be highly effective in both preventing deviations from statutory policy and working with administrators to better understand and satisfy community needs.

A more available check than the legislature on rule-making discretion is the court, which will strike down rules which are not within the granted power, not issued according to proper procedure, or unreasonable.[102] Although judges may exercise wide discretion in determining reasonableness, they cannot be expected to provide consistent protection against unwise or unfair rules. The court, Mr. Justice Cardozo said, "is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. . . ./E/rror or unwisdom is not equivalent to abuse."[103]

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[101] Ill.Rev.Stat., 1971, Ch.110, §264 *et seq*.

[102] Davis, *Administrative Law; Cases-Test-Problems*, 1965, p.111.

Although the success of legislative policy often depends on enlightened rule-making, there are no safeguards that can guarantee the making of wise rules. However, certain procedures, such as the requirement of an open hearing, can promote sound rule-making. The hearing requirement is based on the assumption that through exchanging ideas with all the regulated parties the rule-maker can more fully understand the position of those parties and, consequently, write wiser and fairer rules. It is an attempt to put into practice the salutary jurisprudential principle that decisions can be made in the public interest only to the extent that all the interests affected are first fully considered.[104]

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[103] American Telephone and Telegraph Co. v. United States, 299 U.S. 232 (1936). A dramatic example of judicial unwillingness to overrule agency rule-making despite strong disagreement with its wisdom is Board of Education of Aberdeen-Huntington Local School Dist. v. State Board of Education, 189 N.E. 2d 81 (Ct. App. Ohio, 1962), in which the State Board of Education revoked the charter of a local school board because it was not in compliance with the minimum educational standards set by the State Board. Although he found evidence that some of the standards were violated, the trial judge reversed the charter revocation. The appellate court, however, reversed the trial judge, and reinstated the revocation and, in noting that the legislature had not provided adequate funds to meet the minimum standards, observed the following about its own decision:

> We can readily understand the feeling of the trial judge and appreciate the conclusions he reached. Were we to do as he must have done--write from the heart instead of the head--I am quite sure that our conclusions would be the same as his. Our sympathies certainly lie in that direction; however, the law indicates that this is not proper and that the control of schools is and always has been vested in the Legislature of our state and not in the local school boards. The doctrines of substantial compliance or comparative compliance with the minimum standards do not apply here. It is incumbent upon local boards and local high schools to scrupulously meet these minimum requirements. 189 N.E. 2d at 85.

For reasons peculiar to the field of education the policy of considering all views before making rules is vital to effective nonpublic school regulation. The constant intellectual ferment in educational thought precludes the possibility that anyone can make rules to meet all school situations solely on the basis of his own belief in certain enduring principles of sound education. Traditional theories are being supplemented, amended, or discredited so rapidly that unswerving reliance on long-accepted, unreexamined ideas inevitably sacrifices the best for the easiest solutions.

Equally as important as willingness to consider different ideas is the predisposition to consider ideas from different people. More than in most areas of governmental regulations, in education valuable insights are not limited to persons with professional qualifications. They can come from anyone of intelligence, seriously concerned with educational problems, especially if they are his own.

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[104] Stone, "The Twentieth Century Administrative Explosion and After," 52 U.Col. L.R. 513, 532.

The requirement of notice and hearing before rule-making is only one method for promoting fair and intelligent decision-making by requiring consideration of the views of those affected by the decision-making. Formal hearings may often be overly time-consuming, costly, and inappropriate for certain minor types of decisions.[105] There are numerous more informal methods a state education agency can use to elicit useful information from interested and knowledgeable sources.

Probably the most effective procedure for this purpose is to draft tentative rules and then submit them to the interested parties for written comments. A department of education can also sponsor periodic statewide nonpublic school conventions or hold smaller, more specialized conferences. Space in its bulletin or journal can be devoted to views of nonpublic school officials. It can initiate informal contacts through questionnaires, telephone calls, or personal consultations. The industry-committee system used by the War Production Board and Office of Price Administration during World War II could be effectively adapted to nonpublic school regulation. Such advisory committees made up of professional educators, religious leaders, and community spokesmen of various types could be the source of valuable ideas in proposing and reviewing rules governing nonpublic schools. The agency could also promote consideration of divergent views by employing people with diverse school backgrounds. Finally, inviting detailed criticism of the statutory scheme and agency practices by various nonagency experts could facilitate periodic reevaluation of the department's success in regulating nonpublic schools.

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[105] Davis, Administrative Law Treatise, 222.11 at pp. 125-126.

Although these tactics could stimulate illuminating exchanges of ideas, the legislature would be ill-advised to require an agency to use them. Their success depends on the administrator's personal judgment of the type of issue involved, the proper timing, the disposition of the parties, and the agency's past experiences. A statute cannot tell an administrator the proper time to hold a conference or consult outside advisors. It cannot estimate which problems could be best solved by soliciting suggestions from knowledgeable parties. Thus, before binding agency discretion by any of the aforementioned procedural safeguards, the cost in administrative efficiency must also be measured. But even if the legislature is willing to sacrifice a high degree of administrative efficiency for procedural protections, it has been noted that there are no safeguards that can require agencies to make wise and fair rules. Legislative oversight except in circumstances having high publicity value is virtually nonexistent. Judicial review is almost always available, but judges are usually reluctant to substitute their own ideas of wisdom and fairness for those of the agencies.

For wise and fair treatment under statutes delegating broad rule-making powers nonpublic schools must rely ultimately on the intelligence and goodwill of government officials and, of equal or greater importance, on acceptance by the general public of the basic methods and goals of nonpublic schools. Where the legislature and agency officials, with the general support of the public, are intent on strict controls over nonpublic schools, the above discussed procedural safeguards and constitutional restraints will not guarantee nonpublic school officials the freedom they believe warranted. The best safeguard against harmful governmental interference in nonpublic school affairs is thus not reliance on either substantive or procedural legal rights, but on a constructive and cooperative approach towards the settlement of differences.

V

ALTERNATIVES TO EXISTING MODES OF NONPUBLIC SCHOOL REGULATION: DISCLOSURE AND SELF-ACCREDITATION.

DISCLOSURE

The importance of disclosure of product information varies directly with the degree of freedom of choice the prospective consumer has in choosing between different products. In regard to choice of schooling, disclosure could make a significant difference in a parent's or a student's decision where a large variety of highly divergent schools are available. It would make less difference where the available schools are kept to fairly uniform standards through regulation and no difference where the public school is all that is available. Thus, the decision as to how much disclosure should be required of nonpublic schools depends in large part on the policy decision as to how much freedom parents and students should have in choosing alternative forms of education.

Clearly, where the parent and student are deemed the only legitimate judge of the appropriate form of education and the role of the state in assuring a minimum uniform educational standard is rejected, a high degree of disclosure is warranted in order that the decision-maker may know the available alternatives and base his decision on factual assumptions that are true.

To the extent one disagrees with the reality of classical economic theory's self-interest maximizing model of man, one will discount the importance of disclosure in affecting decision-making. Yet, whether or not most people effectively utilize product disclsoure, it is clear that without it consumers are wide open to abuse in the marketplace and the potential for interest maximization is seriously impaired.

Illinois law does not require nonpublic schools to make affirmative disclosures of information to the public. The statute regulating the granting of academic degrees does require that before institutions can grant degrees they disclose to the Superintendent of Public Instruction relevant information that the Superintendent may request, including a description of the prerequisite courses of study.[106] No provision is made, however, for disseminating this information to the public.

The only statutory provisions with respect to disclosures to the public are prohibitory, making the dissemination of false or misleading information illegal. Thus, the Illinois act regulating business and vocational schools authorizes the Superintendent of

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[106] Ill. Rev. Stat. ch. 144, #234 (1971).

Public Instruction to withhold or revoke the certificate of approval for such schools which present "to prospective students information relating to the school, or to employment opportunities or enrollment in institutions of higher learning after entering into or completing courses offered by the school, which is false, misleading, or fraudulent," or which misrepresents "to students or prospective students that they are qualified upon completion of any course for admissions to professional examinations under any occupational licensing act."[107] Similarly, the Illinois Consumer Fraud Act prohibits in connection with the sale or advertisement of services the use of any deception, fraud, or misrepresentation or the concealment or omission of any material fact with intent that others rely on the concealment or omission.[108] Since all nonpublic schools sell and to some degree advertise their services, they would be subject to the provision of this Act, although in the context of its other provisions it is clear that the Act is aimed at businesses involved more in commercially oriented rather than scholastically oriented activities.

The Consumer Fraud Act obliquely requires affirmative disclosure by making it illegal in selling or advertising to omit any material fact with intent that others rely on the omission. Obviously, more detailed disclosure requirements are necessary if nonpublic schools are to be obligated to disclose information sufficient for prospective consumers to form an intelligent opinion as to the relative merits of different nonpublic school programs. Before discussing the contents of an affirmative nonpublic school disclosure law, two existing disclosure laws are worthy of consideration, the Federal Consumer Credit Protection Act[109] and the Securities and Exchange Laws of 1933 and 1934.[110]

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[107] Ill. Rev. Stat. ch. 144, §151(6) and (17) (1971).

[108] Ill. Rev. Stat. ch. 121½, §262 (1971).

The Federal Consumer Credit Protection Act, also known as Truth-in-Lending, requires lenders to disclose in their contracts figures showing the actual cost of credit, including the finance charge, the cash price, and the interest rate expressed as an annual percentage rate. The theory behind the Act is that by requiring all lenders to disclose the cost of credit in simple uniform terms, the borrower can get the best deal by comparing the credit costs of alternative lenders. This theory is based on the assumption that were it properly disclosed, the cost of credit would be a factor on which consumers would rely in deciding where and whether to borrow. Studies finding that Truth-in-Lending has had minor impact on consumer behavior indicate that this assumption may not have been valid.[111]

The Truth-in-Lending approach to disclosure is even more ineffective for purchasers of nonpublic school services than purchasers of consumer goods. Unlike the buyer of a typical consumer good, the parent who is the buyer of educational servies is not primarily concerned with whether or not the cost of a prospective purchase will be worth the expected satisfaction of a present need. Rather, he is mainly concerned with whether an investment now, that is irretrievable in terms of his child's intellectual development, will have an effect on his child's mind that will help him achieve in the distant future a variety of life-fulfilling goals. Clearly, a framework for disclosure is needed that is more complex than that of simply enumerating a few isolated objective facts about the tangible characteristics of a particular school. The approach to disclosure of the Securities and Exchange Acts provides a more helpful model.

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[109] 15 U.S.C.H. §§160 *et seq.*

[110] 15 U.S.C. §§77 *et seq.*

[111] G. Day and W. Brandt, *A Study of Consumer Credit Decisions: Implications for Present and Prospective Legislation* (Stanford U., 1972); R. Pullen, "The Impact of Truth-in-Lending Legislation: The Massachusetts Experience" (Research Report No. 43 to Federal Reserve Bank of Boston, Oct. 1968).

The Securities Act of 1933 requires that a company file a registration statement with the Securities and Exchange Commission before it can sell its securities.[112] The registration statement must contain a wide and detailed variety of facts about the company and its proposed securities, including a description of the company's property and business, the significant provisions of the proposed securities, information about the company management, and an independently audited financial statement. The Commission then examines the statements, which are a public record, to make sure they are complete. However, it does not attempt to verify the truth of the facts disclosed. After registration of their securities, companies under the Securities Exchange Act of 1934 must file periodic reports with the Commission to keep current all of the information contained in the original filing.[113]

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[112] 15 U.S.C. §77 *et seq.*

[113] 15 U.S.C. §78 *et seq.*

Most important, both the 1933 and 1934 Acts make it illegal to make any false or misleading statement with regard to any material fact or to omit any material fact that should have been included to make the other statements accurate. It is impossible specifically to define what a material fact is, though it would include those facts which if known by the reasonable buyer would probably affect his investment judgment.

The Commission is given broad investigatory power in order to find evidence of statutory violations. Remedies available to the Commission include application for an injunction against allegedly illegal acts, criminal prosecution, and various remedies such as revoking brokers' registrations. Individuals harmed by violations of the Act have a private right of action to seek damages for the harm suffered.

The foregoing is a far too brief description of a highly complex subject matter. However, it does indicate the outline of a comprehensive and systematic scheme for ensuring accurate disclosure to the prospective investor of the wide spectrum of information that is necessary to make an intelligent predictive judgment as to an investment's potential for realization in the future. The feature of the Securities Acts approach which is most important for an effective nonpublic school disclosure law is its general requirement that the prospective investor be given the complete picture of the facts material to an informed opinion on an investment's prospect for return in the future.

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This approach to disclosure is partly normative in requiring disclosure of facts which the legislature believes investors should consider in forming intelligent opinions and partly predictive in also requiring accurate disclosure of those facts which investors regularly rely on in making their decisions. Because of these normative and predictive elements, the views of both professional educators and lay persons should be considered in determining the specific factual matters that should be revealed under a nonpublic school disclosure law. Consideration should also be given to research findings on both the criteria actually used by parents in choosing nonpublic schools and the indicia that may be used to predict the achievement of specified goals by nonpublic schools. The enforcement agency under a nonpublic school disclosure law should also be given considerable discretion in determining what matters must be disclosed in order to give parents and students the information necessary to make intelligent judgments about nonpublic schools.

One of the major deterrents to violations of the Securities and Exchange Laws, private civil damage suits by individual investors who have lost money because of the violation, would clearly not be nearly as potent an enforcement mechanism under a nonpublic school disclosure law. Consequently, a more active role by the enforcement agency would be necessary. This would be especially important with regard to enforcing compliance with a provision similar to section 77 of the Securities Act which makes it illegal to mislead investors as to material facts both through

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positive statements and the failure to make positive statements that should have been made to avoid misleading the investor. Such a provision puts a heavy, but necessary, affirmative burden on the seller to make sure that his statements give the potential buyer a full and accurate portrayal of his existing and intended operations.

Without suggesting that the following is a complete list, some of the information that a nonpublic school disclosure law may require a school to submit would include:

(1) financial statement;
(2) physical facilities;
(3) staff, including their education and experience;
(4) curriculum and requirements for graduation;
(5) present students and numbers that have failed and dropped out;
(6) average and median scores of students on standardized aptitude and achievement tests;
(7) academic placement and performance of students after graduation;
(8) statement of the school's basic philosophy and methodology of education.

A final element that must also be considered in devising a disclosure scheme is the cost that would be incurred both by the individual schools and by the public in its support of an enforcement agency. A disclosure scheme that is complex and costly may have the effect of diminishing rather than maximizing parental choice in nonpublic school education by driving out of business thinly capitalized schools that cannot afford complying with expensive disclosure requirements. Therefore, the SEC approach of making all registrants share in the entire cost of the disclosure program would probably be inappropriate because of the financial situation of a significant proportion of the nonpublic schools. Therefore, although the agency enforcing a nonpublic school disclosure law should have the capacity to vigorously investigate specific complaints and where warranted to either administratively or prosecutorily remedy the violations, it would probably be too expensive to expect it affirmatively to enforce general compliance, except possibly through spot checks. Sufficient incentive for schools to comply with disclosure requirements without an affirmative agency enforcement program should result from, first, requiring the disclosures both to be of public record and to be given to all prospective applicants, and second, awarding a fixed amount of money damages to persons given misleading disclosures, regardless of any provable harm.

The foregoing is not intended to be a complete analysis and description of a nonpublic school disclosure program, but rather a tentative view of a possible approach to such disclosure. There are clearly many additional factors to be considered besides those discussed above, including the need to mandate such disclosure in view of the actual social problems presented by nonpublic schools in Illinois.

SELF-ACCREDITATION

For a variety of policy reasons discussed herein by Professor Erickson, the state may wish to stay out of the area of direct nonpublic school regulation and rely instead on the accreditation of such schools by private accrediting bodies, such as the seven regional accrediting associations.[114] There are a number of ways the state may structure such a relationship. Accreditation could be a prerequisite for the legal existence of a nonpublic school, or for the granting of a degree, or for the acceptance of a school's graduates in a state university. It could also be one of several alternative methods by which a nonpublic school could attain the state's stamp of approval. Whichever method is used, there are inevitable legal problems when a school either loses its accreditation or is denied accreditation.

In Illinois, as in most states, courts exercise a general policy of noninterference in the affairs of private, nonprofit, voluntary associations, such as the seven regional accrediting associations.[115] Nonmembers traditionally have no right to judicial review of an association's decision denying them membership. Members who have been expelled, however, have a limited right to judicial intervention in order to determine whether the expulsion was in accordance with the rules of the association.[116] The association's rules are deemed to constitute the terms of a binding contract between the association and the member. Therefore, an association owes an obligation to adhere to its rules only to those who, as members, are party to the contract. Thus, where accrediting associations extend membership to accredited schools, as do the regional accreditation associations, the common law gives such schools a measure of protection against arbitrary action by the association. Although without any private contractual rights with respect to an association, a nonmember who has received accreditation would, at least under the better legal theory, also have a right to judicial review of its disaccreditation. Accreditation of a nonmember school under this theory may be deemed to confer a form of membership status which a school relies on, and which therefore deserves protection against arbitrary removal.[117]

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[114] Infra, ch. 5.

[115] Robinson v. Illinois High School Ass'n., 45 Ill. App. 2d 277 (1963); Parsons College v. North Central Ass'n. of Col. & Sec. Schools, 271 F. Supp. 65 (N.D. Ill. 1967).

Just as nonmembers have no right to membership in an association, a party seeking an association's accreditation under common law would have no right to judicial review of a denial of such accreditation. However, as the court noted in Marjorie Webster Jr. Col. v. Middle States Ass'n. of College and Secondary Schools:[118]

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[116] Talton v. Behncke, 199 F.2d 471 (7th Cir. 1952).

[117] Comment, Educational Accrediting Agencies, 52 Cornell L.Q. 104, 109 (1966).

[118] 432 F.2d 650 (C.A. D.C. 1970).

> The increasing importance of private associations in the affairs of individuals and organizations has led to substantial expansion of judicial control over "The Internal Affairs of Associations not for Profit." Where membership in, or certification by, such an association is a virtual prerequisite to the practice of a given profession, courts have scrutinized the standards and procedures employed by the association notwithstanding their recognition of the fact that professional socities possess a specialized competence in evaluating the qualifications of an individual to engage in professional activities. (Footnotes omitted.) [119]

The argument that courts should carefully review denials of accreditation by associations which in fact have monopoly power over successful practice in a given field would be especially convincing with regard to an association whose accreditation the state uses as the basis for granting funds or other privileges and benefits, including of course the right to remain in operation. The regional accrediting associations enjoy this form of monopolistic power with respect to several federal-aid-to-education programs.[120]

Even without the type of governmental relationship discussed by Professor Erickson,[121] the regional accrediting associations are involved in public interest related activities to such a degree that they may well satisfy the "state action" requirement of the fourteenth amendment and thereby bring to bear the panoply of constitutional restraints that apply to governmental actions.

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[119] Ibid., at 655.

[120] Educational Accrediting Agenices, supra note 109, at 125 et seq.

[121] Infra, ch. 5.

Such an argument was rejected with respect to the North Central Association by one federal district court and accepted with respect to the Middle States Association by another, although the decision of the latter was reversed on appeal on other grounds, the higher court specifically saying it would not decide the "state action" question.[122]

Whether or not academic accrediting associations are held to the high standards of substantive and procedural fairness under the fourteenth amendment, it is clear that because of the importance of their actions to the public in general and to the individual schools affected by their actions their decisions in revoking and denying accreditation are subject to some standard of judicial review.

In reviewing the substantive fairness of decisions of accrediting associations, however, the court is likely to accord substantial deference to the expertise of the association. With respect to the denial of accreditation to a school by the Middle States Association, the Court of Appeals for the District of Columbia recently stated:

> . . .judicial review of appellant's standards should accord substantial deference to appellant's judgment regarding the ends that it serves and the means most appropriate to those ends. Accreditation, as carried out by appellant, is as involved with educational philosophy as with yardsticks to measure the "quality" of education provided.[123]

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[122] *Parsons College*, *supra*, note 108: *Marjorie Webster Jr. College*, 302 F.Supp. 459, rvsd. 43 F.2d 650 (1970).

[123] *Marjorie Webster Jr. College*, *supra*, note 110, at 657.

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The rationale for judicial deference was accorded even more importance in a case involving revocation of accreditation by the North Central Association:

> [I]t is urged that the action of the Association was arbitrary in the substantive sense, without regard to the fairness of the procedure by which it was reached. In this contention, the College questions the adequacy of the reasons given for withdrawing its accreditation. In this field, the courts are traditionally even more hesitant to intervene. The public benefits of accreditation, dispensing information and exposing misrepresentation, would not be enhanced by judicial intrusion. Evaluation by the peers of the college, enabled by experience to make comparative judgments, will best serve the paramount interest in the highest practicable standards in education.[124]

With regard to the procedures an accrediting association must follow in revoking accreditation, the common law sets a general requirement of fairness, which would include at a minimum notice of the charge and an opportunity to be heard.[125] The specific procedures that would be appropriate would depend on the actual circumstances of the decision-making process. In Parsons College v. North Central Association, the court found that only notice and hearing were warranted:

> Here, no trial-type hearing, with confrontation, cross-examination, and assistance of counsel would have been suited to the resolution of the issues to be decided. The question was not principally a matter of historical fact, but rather of the application of a standard of quality in a field of recognized expertise. Here there were no witnesses to be called to make particular accusations. The members of the Examining Team were present at the meeting of the Executive Board, available for questioning

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[124] Parsons College, supra, note 108, at 74.

[125] Chaffee, The Internal Affairs of Associations Not for Profit, 43 Harv. L.R. 993, 1015, 1016 (1930).

> if needed. Since the Association has no power to summon witnesses or to compel them to testify, to require the full panoply of the procedure of a judicial trial would frequently make it impossible for the Association to act. . . .(Citations omitted.)[126]

However, where an accrediting association's revocation or denial of accreditation is deemed "state action," thereby invoking the fourteenth amendment's standards of procedural due process, it is well established that the various protections associated with a trial-type hearing including confrontation of witnesses, cross-examination, and right to counsel would be required.[127]

In sum, whether or not to entrust the government's role in regulating nonpublic schools to private accrediting associations is a basic policy question, which depends on one's assessment of the best mechanism for resolving issues concerning nonpublic schools and their relation to the public interest. However, it should be noted that there is little if any advantage in delegating such determinations to a private body in order to escape the restraints on decision-making of the constitutional requirements of due process and the first amendment. Where the decisions are made by private persons who are in effect performing functions which are normally the duty of the state and which significantly affect the interests of the public, courts will apply to such decisions the same constitutional restraints that apply to decisions of the government.

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[126] Parsons College, supra, note 108, at 74.

[127] Willner v. Committee on Character and Fitness, 373 U.S. 96 102, 103 (1963).

V

CONCLUSION

The future of the nonpublic school in this country is not entirely at the mercy of the state. The first amendment's protection of the freedom of speech and the included protections of "freedom of inquiry, freedom of thought, and freedom to teach"[128] guarantee the nonpublic school at least some degree of independence in developing its own educational programs. Yet, it would be risky to rely on the first amendment to protect the autonomy of the nonpublic school, for the assertion of the constitutional right will prevail only if the state fails to convince a court that its regulations are necessary for the welfare of the children and the public. Where a nonpublic school's unusual program is not generally accepted as the proven way, the court is likely to bow to the judgment of the state. Thus, to maintain its independence the nonpublic school cannot stand on its constitutional rights, for these rights may not give solid support. Reliable safeguards are possible only if the nonpublic school works with the state to develop a framework for minimizing the inevitable conflicts and for resolving them through cooperation rather than confrontation. Such a framework, however, depends on each party recognizing the legitimate interests of the other.

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[128] Griswold v. Connecticut, supra, note 53.

There are two pre-eminent justifications urged for the state's regulation of nonpublic schools' educational programs. First, it must assure a politically responsible citizenry, one composed of people who can read and understand the nation's institutions of government. Surely the state without threatening the integrity of nonpublic schools can require them to show through objective testing that their students have mastered elementary reading skills and learned basic facts about our governmental system.

Second, the state may regulate nonpublic schools in order to assure that a child's education, or lack thereof, is not detrimental to his own welfare. However, there is in this country an historic tradition, recognized by the Supreme Court in Wisconsin v. Yoder and by the Illinois Legislature in its declaration of policy for the Nonpublic State Parental Grant Act, that the primary role in the upbringing of children is that of the parent. The state may intervene in this relationship, but only when the parent fails in his duty to his child. In view of their common goal of benefiting the child, it would seem far preferable for the state, rather than initially limiting the parents' freedom to choose the most appropriate education for his child, instead to assist the parent in that endeavor. Enforcing a comprehensive disclosure law for nonpublic schools is one example of a way to assist a parent in this regard.

Even with disclosure required of nonpublic schools, it is indisputable that some parents may fail to provide their children with an education that is adequate by any standard. State intervention is then clearly needed in behalf of the child. Some states, however, seem to presume that most parents in choosing schools are incapable of protecting their children's interests. They therefore attempt to insure through strict regulation that no school will fall below state-determined minimum standards. While perhaps preventing unsound practices by some schools, such comprehensive regulation inhibits an unknown number of others from attempting new approaches to education that could result in great benefit to students and community.

Illinois does not take this comprehensive approach towards nonpublic school regulation. Where a child attends a nonpublic school that is beneath acceptable standards, Illinois resorts to the criminal law to prosecute the parents. Since conviction under the truancy law requires proof beyond a reasonable doubt, there is some protection against an excessively narrow view of what constitutes an acceptable alternative to public school. However, fining and imprisoning parents does not seem the most appropriate way to achieve the truancy law's real purpose of educating children. More appropriate would be enforcement through civil proceedings, with their injunctive remedies and the contempt power as a last resort.

However, use of even the civil courts is not the best way for the state to proceed upon initially finding a suspected violation of the truancy law. Since complex pedagogical issues may be at stake, there should be an opportunity for the nonpublic school personnel whose program is challenged to appear at an administrative hearing and present their views to hearing officers who have expertise in education.

Improvement in the procedures by which Illinois regulates nonpublic school attendance will yield scant benefit if the substance of the law is not also changed. Requiring a vague measure of equivalence between nonpublic school curricula does not necessarily protect the nonpublic school student in view of the unsatisfactory conditions of some public schools. Rather than impose such a restrictive, all-encompassing requirement as equivalence for nonpublic schools, it would seem far wiser to set standards related to the child's actual needs in becoming an adult proficient in the skills necessary to get along in life. Through objective testing the state could determine whether a nonpublic school is succeeding in satisfying these needs without unnecessarily restricting the nonpublic school's freedom to innovate.

The foregoing suggestions for changing the framework of nonpublic school regulation would reduce, but not eliminate, conflict between state and nonpublic school. The line between unusual educational methods with a substantial chance for beneficial results and methods that threaten students with significant harm to their intellectual, physical, or emotional development may sometimes be a fine one. In such cases putting the state and nonpublic school to their proof in a civil legal contest may be the most appropriate way to determine on which side of the line the particular educational practice falls. However, one of the primary goals of a nonpublic school regulatory system should be to reduce such conflicts to the necessary minimum in order that the majority of nonpublic schools may retain the independence to be a meaningful alternative to the public school system.

CHAPTER 5

SUMMARY AND IMPLICATIONS*

> [T]he state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach.[1]

> The vigilant protection of constitutional protections is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authorative selection."[2]

The investigation reported in these pages raises a rather startling possibility: While many Americans have resisted the tendency of government to become Big Brother, the state has

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The work reported here was funded by the Continental Illinois National Bank Foundation and sponsored by the Illinois Advisory Committee on Nonpublic Schools. One major impetus for the study was the Illinois Advisory Committee's concern over new regulatory policies for nonpublic schools, reportedly under consideration in Illinois. In numerous respects, however, we have found it analytically useful to examine, not only state controls for *nonpublic* schools, but the state's responsibility to impose guidelines, standards, safeguards, and other prescriptions in public *and* nonpublic educational sectors. Our research has been in no significant sense empirical. Rather, the author has attempted to draw together, analyze, and build upon, numerous strands of relevant thought from efforts under way elsewhere, from recently completed investigations, and from literature spanning many decades. Early in the study, John Elson of the Mandel Legal Aid Clinic of the University of Chicago agreed to provide the legal analysis found in chapter 4. Further assistance was obtained from Bruce Cooper of the faculty of the University of Pennsylvania and James S. Cibulka of the faculty of the University of Wisconsin at Milwaukee.

emerged as Super-Parent without widespread challenge, at least in recent decades. State legislatures and administrative agencies have shockingly extensive power--seldom recognized or examined--to specify how all children must be reared, despite the limits this power imposes upon individual liberty, cultural diversity, and educational experimentation.

Summary of Earlier Chapters

The state has responsibility to help ensure, through education, (a) that all children will have a reasonable chance to pursue happiness as autonomous human beings and (b) that the social fabric upon which virtually everyone's welfare depends will be preserved. Children and adults must be protected from conditions in educational settings that may endanger their physical and mental health. Individuals deserve protection against fraudulent business practices--against unscrupulous purveyors of educational services. Civil liberties must be preserved.

Of the numerous regulatory approaches that could be adopted with those ends in view, however, state legislatures have placed astonishingly extensive reliance upon the most questionable, liberty-endangering method of all--the method of prescribing the processes by which all children must be reared during the extensive periods when school attendance is compulsory. Little attention has been given to other ways of fulfilling government's regulatory responsibility in education. If state officials know what understandings and skills are essential to responsible adulthood, these understandings and skills can be demanded without imposing operating specifications on all educational enterprises accepted for compulsory attendance purposes. Parents, students, and educators could be given complete freedom to decide how the specified competencies would be required, so long as each child demonstrated periodically (by responding to reputable tests, for example) that at least normal progress was being made. Or in keeping with the limited relevant evidence[3] and much of our political theory, government could assume (at least until encountering indications to the contrary) that most parents by far will make responsible, reasonably rational educational choices if given opportunity to do so. The state could then fulfill its responsibility by maintaining a regulated open market in education. It could require all schools to be honest and informative toward students and parents, could institute procedures and penalties to protect students and parents against mistreatment, and could leave the processes of child-rearing unspecified. There are many other discernible ways, including several discussed later in this chapter, in which government can fulfill its regulatory responsibility without imposing standardized child-rearing practices on everyone and thus seriously intruding upon the liberties that students, parents, and educators seek to exercise in educational settings.

To simplify discussion in the present study, we use the term programmatic to identify state controls which dictate child-rearing programs, methods, or procedures, thus depriving students, parents, and educators of the discretion they would otherwise enjoy. In contrast, one nonprogrammatic regulatory approach already mentioned is to specify the essential outcomes of child-rearing while leaving the methods up to student, parents, and educators. The "regulated open market" strategy is also nonprogrammatic. We have asserted that the states in this union have placed surprisingly extensive reliance on programmatic controls. For instance, when a state demands that all youngsters attend schools, regardless of whether they or their parents prefer learning experiences in other settings, it is imposing programmatic controls. Thus, numerous courts have held that home instruction, no matter how impressive its quality, is not acceptable in lieu of school attendance,[4] and until the recent Supreme Court decision in their favor,[5] the Amish were harassed, arrested, fined, jailed, and deprived of their property through sheriffs' sales for substituting their impressively effective post-elementary system of learning-by-apprenticeship-to-parents for conventional high schools.[6] Obviously, the states in which these occurrences have taken place are not content to demand certain essential understandings and skills, but have insisted upon prescribing the institutional *context* in which these competencies must be developed. In effect, furthermore, since schools must fulfill certain requirements to be recognized for compulsory attendance purposes, these states have dictated the *means* by which the understandings and skills must be acquired. Laws which spell out teacher qualifications, methods of pupil management, and curricula are obviously programmatic. Their effect is to dictate processes of child-rearing, at least during the extended periods when attendance is mandatory.

Scores of programmatic controls are spelled out in a 1973 document released by the Office of the Superintendent of Public Instruction in Springfield, Illinois.[7] To cite several examples: With a few stated exceptions, fiscal penalties are imposed on all public elementary school districts with fewer than 15 pupils in average daily attendance, and all high school districts with fewer than 60 pupils. Schools must commemorate a specified list of days honoring "patriotic, civic, cultural, historical, persons or occasions," including, for example, "Leif Erickson Day" and "Arbor and Bird Day." Every school district must have an officer designated as a "superintendent," and every "attendance center" must have an officer designated as "principal," both of whom are to perform legally mandated duties. (By implication, at least, educators are not free, except by special permission, to experiment with educational approaches that do not utilize administrators of these specified types.) With a few stated exceptions, every school system must operate its schools for a daily minimum of five clock-hours and for at least 176 days per year. The curricular offerings of elementary and secondary schools are specified in considerable detail. (In numerous states other than Illinois, school codes contain prohibitions against certain types of instruction in schools.) Certain "media services" are required. No one who fails to meet certification requirements established by the state may "teach or supervise." To qualify as an assistant superintendent, for instance, one must have completed 20 semester hours of graduate courses in "administration and supervision," though there is evidence suggesting that these courses may not only fail to contribute to competence on the job, but may create a trained incapacity to perform well.[8] To realize adequately the inhibiting potential of these controls, one must recognize, further, that in Illinois and virtually every other state nonpublic schools are required, usually through vague statutory language, but sometimes in very specific terms, to be "equivalent" or generally similar to public schools in order to be acceptable for compulsory attendance purposes. In addition, our system of educational governance permits local majorities (acting in behalf of the state) to impose a particular style of life in all public schools in a given area, and our financing arrangements penalize families for opting out of the public system.[9] The state is saying, by implication, to future citizens, their parents, and even educators of their own choosing, that they cannot be trusted to determine what preparation for adulthood is essential in the modern world. Otherwise, why the compulsion?

Strangely enough, these limits on the discretion of all parents are confined to areas generally regarded as "education."[10] Except in cases of stark wrong-doing, parents are free to decide, outside the hours of compulsory school attendance, what will be provided to their children by way of clothing, shelter, food, medical care, recreation, discipline, companionship, and neighborhood characteristics.

It also seems strange, at least at first glance, that government often insists upon dictating a single mode of instruction even in cases where satisfactory or superior results are being produced in other ways. Of several instances of this tendency discussed in some detail in chapter 1, perhaps some should briefly be recounted here to clarify what we mean by programmatic controls: In Kansas, an Old Order Amishman named LeRoy Garber was harassed for many months, arrested, and fined for allegedly depriving his daughter Sharon of a decent preparation for adulthood. But Sharon had mastered (with exceedingly high grades) every subject required by Kansas law, was gainfully employed ("the best help we've had yet," according to her employer), seemed happy and well-adjusted, and in some respects appeared (along with her father) more broadly educated than one of the officials involved in the prosecution. But in imposing the fine on Garber, the district judge declared (with later concurrence from the state's supreme court!): "The defendant has not complied with Kansas compulsory school attendance laws . . . . To comply . . . such a child must attend a private or parochial school having a school month consisting of four weeks of five days each of six hours per day during which pupils are under *direct* supervision of its teacher while they are engaged *together* in educational activities." Similarly, a small "free school" in a large Midwestern city was summarily closed and padlocked for several weeks, apparently because of its unconventionality, though many graduate students and professors from the city's universities had been favorably impressed with the program, and though pupils gave every appearance of mastering the state-prescribed subjects of study. Not too far away, a rural Quaker school was threatened with the loss of its state approval, not because its students were being deprived of the required exposure to the "practical arts," but because they were encountering these arts (cooking, sewing, housekeeping, animal husbandry, carpentry, horticulture, etc.) through direct, supervised experience, rather than by sitting in classrooms and talking about them for the minimum number of hours prescribed by law.

This pervasive programmatic bias persists despite almost total lack of evidence to show that what it prescribes will make schools better rather than worse. In examining the fast-growing literature on "school effects," one is forced to conclude that at this point we know *very little indeed* about what separates the bad schools from the good, though we have many promising avenues of experimentation yet to explore. The standardization of programmatic controls persists, moreover, despite frequent contentions that it is inefficient.[11] Children vary markedly as to the conditions of learning to which they respond. Some youngsters require expensive equipment and remedial instruction to overcome their handicaps. Others need only minimal attention from a teacher, find classrooms oppressive, and learn many subjects best at home, curled up with a book, or tinkering with a ham set. Still others have talents and interest that are furthered most effectively through private lessons, observation of skilled performers, or experience on the job.

Under our current system, however, a single expenditure level normally is determined through political mechanisms for each school district, though logic dictates spending more money on schooling for some children than for others. Furthermore, a striking similarity is reflected in the programs on which the money is spent. Giving parents more freedom to determine what types of schooling will be utilized, and what other learning experiences will be substituted for schooling, could produce a more efficient allocation of available funds, and in some respects (by producing better results among children who do not respond well to orthodox programs) greater equality of educational opportunity.

In his presidential address to the American Educational Research Association in 1972, Robert Glaser observed that though individualization of instruction had been emphasized in public statements repeatedly since at least 1911, American schools were still "characterized by minimal variation in the conditions under which individuals are expected to learn."[12] The methodology of our schools is so uniform that opportunities to study the effects of unconventional approaches with adequate samples are generally nonexistent. Hanushek and Kain, in critiquing the landmark Coleman study, point out that Coleman examined only an "exceedingly limited" range of educational practice, not because he was myopic, but because his national sample of schools exhibited an extremely narrow range of practice.[13] We cannot expect much progress in educational research, Hanushek and Kain assert, until many schools engage in "truly radical" experiments. But if conventional approaches are required by law, how can we expect the essential experiments to occur more than spasmodically?

It should be obvious, however, that the possibility of casting ineffective practices into legal concrete is not as ominous in a democracy as the threats to individual liberty and cultural diversity that programmatic controls may pose. In most areas of life, state legislatures and administrative agencies must be granted wide discretion, so long as their actions are not demonstrably malicious or arbitrary. If government were permitted to take only those actions that were manifestly essential and manifestly wise, our complex society could not function. We have developed numerous mechanisms, however, in an effort to give special protection to rights so vital to a democratic society that they may be infringed upon only for the most urgent reasons. Among these fragile yet crucial liberties, according to the Bill of Rights and scores of Supreme Court decisions, are freedom of speech, freedom of the press, and freedom of assembly. It is a fundamental assumption of our political and legal institutions that the best way to prevent totalitarianism is to keep the marketplace of ideas as open and unlimited as possible.

Should schools be regarded as particularly vital forums for exposing people to ideas, orthodox and unorthodox? At least for those citizens who appear to stop reading and exploring new ideas as soon as they leave school, one could argue that state control of education is more dangerous to liberty than state control of the press. But strangely, many people who profess passionate attachment to freedom of the press and free speech see no problem in permitting the state to determine what may and may not be examined and pursued in schools.

Little attention is given in our society to the fact that the state, when it prescribes child-rearing practices in areas of widespread, deeply felt disagreement, is in effect attempting to impose some selected view of the good life on everyone. If programmatic controls are not based on some concept of the life worth living and the competencies such a life requires, are not those controls arbitrary and irrational? But an Old Order Amishman's view of happy, responsible adulthood is far different from the concept of most middle-class suburbanites, and it implies a radically different educational approach. Who is sufficiently omniscient to decide which way of life is better for everyone? The life style that the national mainstream exhibits is anathema to many American Indians, Blacks, Hutterites, intellectuals, and proponents of radical countercultures. Some segments of our society still place high value on future orientation, achievement drive, acquisitiveness, individualism, and competition. To other people, these tendencies are loathesome, the root of most unhappiness. What values should the schools promote through the curriculum, the social system, or the modus operandi? Even among people who espouse the same general ideals, there is dissension: some, hoping for gradual, comparatively painless reform, want children socialized primarily in terms of our imperfect social order (so these children will not be unhappy misfits), while others want the young prepared to be forceful agents of change, even at the risk of personal malaise. Forms of schooling that some cultures find congenial are utterly disruptive to others; to transplant Scarsdale's purportedly superior schools to the Pine Ridge Sioux reservation, for example, would promote, not educational equality but the destruction of the Indian's social structure.[14] As the Supreme Court itself has recognized, to force Old Order Amish adolescents into conventional high schools is virtually to ensure the dismantling of the Old Order.[15] It seems, then, that when state officials enforce programmatic controls upon dissenting groups in an ostensible effort to guarantee "a higher standard of education," the basic issue is being obscured by bureaucratic rhetoric. The basic issue is: Who has the right to determine what ideals will be expressed in the relevant child-rearing programs?

In chapter 4, Elson notes that the courts have not yet adequately considered the conflict between programmatic state controls and the fundamental rights that students, parents, and educators seek to exercise in schools. He suggests, however, that the U. S. Supreme Court may be ready to undertake a basic reassessment in this regard. More stridently, Robert Hutchins complains concerning "the immaturity of the law, the temper of the justices, and the inadequacy of the theory of the First Amendment to which they resort."[16] "Are the decisions of the state with regard to the curriculum final," he asks, "no matter how they may restrict and distort the education of the young? When, if ever, does a state violate the Constitution in limiting the freedom of teachers and students?"[17] Many other disturbing questions may be asked about programmatic state controls. In the absence of clear guidelines, how far may the state go? Could it, for example, control virtually the entire upbringing of children by extending the hours, days, and years of compulsory school attendance and further intensifying its programmatic regulation? If not, why not? If police can burst into schools on the allegation that child-rearing practices therein are unacceptable, why not into homes? If schools can be told what must and must not be taught, why not newspapers and electronic mass media, especially since the people affected by thought control in schools are young and impressionable? Do we believe in "peaceful coexistence" only so far as dissenting groups beyond our national boundaries are concerned? Will we permit parents outside "the land of the free" more discretion to rear their children in unconventional ways than we will allow here at home? Is there not an unreconcilable contradiction between belief in pluralism and willingness to let the state prescribe how all children must be reared? What triumph of democracy is represented in the freedom to choose nonpublic schools over public schools if the two institutions are required by law to be fundamentally similar? While programmatic controls seem destructive of freedom in all schools, inadequate scrutiny has been given to distinctions among schools which the state itself operates, schools which the state gives major support but does not operate, and schools which the state neither operates nor tenders sizeable assistance. Logically, it would seem that schools not operated by the state should have more freedom from the state's controls than schools that the state maintains, and that schools receiving no sizeable state subvention should enjoy more liberty still.

We have argued that programmatic controls in education menace individual liberty, cultural diversity, and essential educational experimentation. It appears, consequently, that unless we can find some compelling rationale for programmatic controls we will be unable to justify them at all.

In chapter 2 of this report, we examined two major arguments, the most solid logical underpinnings for programmatic controls that we could find in searching the relevant literature and pondering the issues. These arguments concern the state's responsibility (a) to ensure that children have a reasonable chance to pursue happiness as autonomous human beings and (b) to preserve the social fabric upon which virtually everyone's welfare depends. Since the issues in question are so fundamental, we must now briefly recapitulate the discussion in chapter 2.

a. The Rights of Children

Though the generally acknowledged rights of children are numerous and may be articulated in a variety of ways, probably the aspect most pertinent to programmatic controls is the right of the child to choose freely among available ideologies, vocations, and life styles, and to develop the decision-making capabilities that make choice more than a fiction--at least to the extent that inherited characteristics permit. If the state must limit the freedom of parents, educators, and even, in the short run, of children themselves to accomplish this objective, the interference seems justified. The ideal of using schools and colleges to help produce autonomous human beings lies at the heart of the concept of a liberal education.

To satisfy this liberal criterion, educational systems must promote the rationality of children and must function as forums in which a wide range of options can be examined freely. This approach is utterly at odds with attempts by state officials to mold children to some selected vision of the good society. It also conflicts with attempts by parents to stamp particular ideologies and life styles into the young by curtailing the opportunity to decide. If after considering available alternatives, the individual rejects the national mainstream and becomes an Amishman, hippy, or radical intellectual, the state has no ground to complain. It is assumed that in an unmanipulated marketplace of ideas, the best values and ideologies will gain majority support in the long run. Similarly, if the child of an Old Order Amishman decides, after viewing the options in a truly neutral school, that he prefers to work for Standard Oil and live in a two-car suburban slit-level, in an important sense his parents cannot justly accuse the school of alienating their child from them. The purpose of the education was not to disparage one way of life and exalt another, but to make self-determination possible.

When we examine the question of what the state may do to promote this autonomy, however, we are unable to articulate a justification for programmatic controls. If consensus could be reached in our society concerning the reasonableness (if not the clear essentiality) of certain understandings and skills as a basis for autonomy, this consensus would not justify the current system of compulsory school attendance and related regulations. As we have already noted, the state could give parents and children complete freedom to decide how the specified competencies will be acquired, so long as each child demonstrates periodically (by responding to national tests, for instance) that at least normal progress is being made. Or if reluctant to allow that much latitude, the state could at least "license" proposals from parents and students who wish to substitute other educational experiences for in-school instruction, so long as the proposals meet certain criteria of reasonableness, and so long as students show from time to time that they are learning what the state demands.

We should emphasize in passing one major advantage of limiting state educational prescriptions to those understandings and skills which virtually everyone considers essential to autonomous, happy adulthood: To establish educational policies on the basis of agreement among the parties affected is not to impose a hated way of life on anyone's child, for the state is merely doing what the parent wants. In complex societies all over the world, however, state-controlled education arouses parental resistance.[18] The reason is that child-rearing practices sponsored or required by the state in pluralistic societies are at odds with many parental views of the good life and how to prepare for it. Even in pluralistic societies, however, incursions upon individual liberty will be minimized if the state confines its directives to areas of almost universal agreement.

Considering further what the state may do to promote the development of autonomy in the young, we must consider the importance of introducing individuals, during adolescence and early adulthood, to options that are too complex for adequate consideration in the pre-adolescent years. The freedom to choose means little if the individual is unaware of alternatives--unacquainted with ideologies, life styles, and vocations not characteristic of his immediate community. It seems plausible to assert, furthermore, that decision-making skills need more honing than occurs in the elementary grades if one hopes to make rational choices in the complex modern world. A familiarity with the modes of inquiry of several disciples might help. More problems should be manageable, more occupations accessible, and more leisure activities available after an intensive study of mathematics, belles-lettres, and rhetoric. An involvement in group discussion of historical and contemporary issues seems advisable. Exposure to various sports, fine arts, practical arts, and crafts is a good way to open up vocational and avocational worlds. Great ideas from religion, philosophy, and jurisprudence help illuminate the fundamental dilemmas that all humans must learn somehow to manage. Well planned studies of ethnic and religious groups, of various parts of the globe, and of alternative approaches to ethical issues can be argued for quite cogently.

But educational desiderata of this type can be listed almost indefinitely, far beyond the bounds of student time in the high school and even the undergraduate college. We are forced, then, to confront questions pondered for generations by proponents of liberal education: What knowledge is of most worth? What knowledge is utterly essential? At this point, we encounter many enigmas. To master any area of human endeavor to the extent some scholars think essential, we must neglect areas that other scholars think essential. Available, potentially vital knowledge has become an infinite ocean. As a further complication, if schools and colleges monopolize too much time, many individuals may be robbed of the capabilities they should develop outside classroom walls. And to add to these conundrums, in planning today's education we must cope with the demands of tomorrow's unknown world in an era of precipitous change.

State officials who act as if they know what areas of knowledge are essential for everyone must possess insights as yet undiscovered by leading scholars, must be unaware of their own ignorance, or must be guilty of collosal pretension, for there is little agreement or certitude among thinkers who have pondered these dilemmas most deeply. Redfield observes, for example: "If we, like the Homeric gods, were immortal, we could learn all possibly useful methods and undertake all the activities for which they prepared us; over an infinite period of time we could perhaps come to happiness. As it is we must, in education as in everything else, make our best guess and launch ourselves into the void."[19]

But perhaps we have gone too far in applying to the high school ideas on liberal education generated mostly in the context of college-level concerns. Two considerations must be examined in this regard: First, we may be able to identify in the high school, if not in the college, areas of study probably essential to anyone's autonomy. Second, since precollegiate students are more easily influenced than their post-secondary confreres, special steps may be needed to prevent indoctrination and other infringements on their autonomy.

If some areas of study at the high school level are indispensible, in virtually everyone's eyes, to the achievement of individual autonomy, we need not identify them at the present moment. The point to make here is the same one made earlier: If state officials cannot identify the demonstrably vital outcomes of schooling, they have no firm basis for programmatic regulation. If officials can identify indispensible understandings and skills, they have not thereby created a justification for programmatic controls. Why should state intervention not be limited to the cases in which it is shown that children are not making satisfactory progress toward the acquisition of those competencies?

In reaching this conclusion, we must recognize a hypothetical exception, however.[20] If there is only one way to develop some essential understandings and skills, the state is obviously justified in requiring a single, standard approach. We have been able to identify no universally essential area of the school curriculum that can be pursued successfully only in standard schools, and for some areas, these schools seem an obviously inferior place for the desired learning to occur. But the "hidden curriculum" (the set of values and behavior patterns that formal and informal organizational procedures seem designed to promote) may represent a special case.

Dreeben suggests, in this regard, that schooling may be an essential mechanism for developing the "sentiments and capacities" that are imperative for all people who wish "to participate as adults in an industrial nation whose dominant political and economic institutions have not experienced fundamental structural change over the past century."[21] In schools children learn, not so much from their studies as from the patterns of behavior that the organizational structure generates, to relate to others in ways basically different from those learned earlier in the family. In the family, for example, there is a tendency to treat everyone as a unique human being. In the bureaucratic spheres that pervade the larger society, the individual must be capable of working with universalistic norms (which treat all people in a given category the same, disregarding differences among them); of interacting with other people in a limited, specific way (as, for example, when a surgeon deals with the person merely as a patient of a particular type); of differentiating the attributes of an organizational position from the characteristics of the individual occupying the position (as when a worker calmly obeys a forman he dislikes); and of forming and tolerating the transient, shallow social relationships that are so common in organizational life.

On the basis of analyses of this type, we may attempt to justify compulsory attendance at conventional schools by asserting that this policy is designed to provide children, by means of the "hidden curriculum," with competencies entirely essential to the autonomy that is possible in the modern age. In this connection, again, the example of the Old Order Amish is illuminating, for though the simple elementary schools they usually attend exhibit few of the norms of which Dreeben speaks, and though the Plain People almost never attend high schools, they seem typically viewed by employers as superb producers and by bankers and other businessmen as superb clients.[22] There are still many instances, furthermore, of non-Amish individuals who, despite extremely limited formal schooling, have achieved extraordinary success in bureaucratic spheres. It seems obvious, then, that some people can acquire the competencies of which Dreeben writes without being conditioned for many years by the hidden curriculum of the conventional school. For all we know, most people can. Even without examining the desirability of preparing children to be smooth cogs in organizational machinery, then, we conclude that we have not yet found a compelling reason why a state should impose the structure of the conventional school on everyone.

We must consider now the impressionability of children and adolescents. On the negative side, we are concerned with protecting the young from indoctrination. On the positive side, we want to provide a forum (a cafeteria of alternatives) in which youngsters will confront a wide range of options and develop the capacity to make wise, autonomous choices.

Directly pertinent here is a fundamental theme of the literature on liberal education: to liberate, a school or college must free the student from the biasing impact of all parochialisms, be they ethnic, religious, national, or ideological. The autonomous human being, in this view, makes his choices as an *individual*, unburdened by prior commitments to any group position. We may argue, then, that the child must be educated in a neutral school, not a school operated by a private community or a special interest group.

But the question of whether the state has the capacity to guarantee the neutrality of any school is both crucial to our analysis and generally neglected. If the state cannot ensure that an educational forum is unbiased, it obviously cannot invoke the ideal of individual autonomy as a justification for requiring all children to spend many years within that forum.

Official school observances seem at first glance to be the easiest segment of school activity to neutralize. There is nothing subtle or hidden about them. But evidence on the ineffectiveness of legal directives in education is sufficient to give anyone serious pause. Whatever one may think of Supreme Court rulings on prayer and Bible reading in public schools, the record is clear: the rulings have been widely flouted, and apparently no one can do much about the flouting.[23] Locally powerful groups run schools in keeping with their own viewpoints, in important respects.

Many scholars insist that it is unrealistic to expect schools to maintain an unbiased stance. Neutrality can hardly be achieved unless school officials disregard demands for privileged treatment from the same constituency that granted them power and privilege. After examining several societies, especially our own, the late sociologist-anthropologist Jules Henry concluded that autonomy-promoting education was not possible in schools maintained by any society or cultural group.[24] The logic of his analysis is straightforward: No social system can be expected to take deliberate self-destructive steps. Since every social system Henry had examined or read about, including our own, seemed based upon obviously illogical assumptions, every one of these social systems depended for its survival upon the inculcation of "socially necessary ignorance."

There is room to suggest that some of Henry's specific charges are extreme. So far as we can determine, however, no respected body of opinion in the social sciences regards the schools of any society as neutral with respect to the ideologies and life styles they present for the consideration of the young. At least one major historical treatise has as its central theme the remarkable correspondence of schools with the social orders that have sponsored them.[25] Part of the explanation for biased schools is the myopia that comes naturally with socialization to any life view. When most people in a given locality find a school congenial, they usually consider complaints about discrimination to be unreasonable.

But if easily detected observances are a problem, the curriculum is much more difficult to neutralize. Here again, what one person views as neutrality is outright antagonism to another. For instance, some citizens view an education denuded of theism as neutral. Others disagree stridently.

As for the way curricular materials are presented, widespread efforts have been made in recent years to render instructional approaches more conducive to independent inquiry. Teachers have been urged repeatedly, in many ways, not to present the sciences dogmatically, as bodies of facts to be assimilated, but to familiarize students with the modes of investigation scientists use to seek knowledge. The latter approach is liberating. But how can the state make certain that every child will be given this type of educational experience, especially since the number of teachers is so large that we cannot possibly have exceptionally qualified people in most classrooms? There is research to suggest that despite more than a decade of extensive efforts, funded by millions of federal and foundation dollars, to produce inquiry-oriented instruction in the physical and biological sciences, teachers as a whole--including those who have participated extensively in special institutes--merely adapt the new materials to the old methods.[26]

In connection with the presentation of controversial topics in schools, furthermore, a major complication inheres in the fact that children are profoundly influenced by those comparatively few adults with whom they identify strongly. How then can we keep individual teachers and administrators from stamping out, through the influence they exert over the young, minority ideologies and life styles? As one approach, we could forbid discussion of all value-related topics, since few individuals seem capable of presenting positions with which they disagree as cogently as they present positions with which they agree. But since virtually every aspect of life is fundamentally significant to someone, this policy would place a taboo on almost everything, and make the widely documented boredom of the classroom more deadly than ever. And even if we could prevent teachers from presenting unbalanced discussions of value-related topics, we would have to reckon with such nonverbal influences as an attractive or repugnant personality. When admiring and beginning to identify with a teacher, a youngster is likely to acquire some of the teacher's attitudes and values. There is no reasonable way to eliminate these biases. Furthermore, we cannot expect teachers even to attempt to hide those prejudices of which they are unaware. (One need not study much anthropology to discover that every culture is shot through with unexamined assumptions that members of other cultures find repugnant.)

But the aspect of the school that is probably most potent, yet most difficult to neutralize, is the student subculture, particularly during the pre-adolescent and adolescent years. Educators as yet know little about it, to say nothing of learning how to control it. As James Coleman's study suggests, conformity to the norms of student peer groups is apparently induced by the "rating and dating system," which mercilessly dispenses popularity, respect, acceptance into the crowd, praise, awe, support, aid, isolation, ridicule, exclusion, disdain, discouragement, and disrespect.[27]

It seems patently ridiculous to proclaim educational neutrality when a child from a pacifist minority attends a public school in wartime, when a few Jehovah's Witness children are required to rub shoulders with many peers who consider "Russellite" doctrines inane, when a few Navaho children, reared to practice mutual assistance, are placed in a school where most students compete ruthlessly, and in a hundred other settings where merciless social sanctions are exercised against children who behave in accordance with minority ideologies, values, and life styles. Whether capitulating to these pressures or maintaining his or her integrity, the individual may acquire permanent scars.[28]

As if these impediments to school neutrality and individual autonomy were not enough to cause despair, we must add the contention considered earlier--that the organizational structure of a school, in its formal and informal aspects, far from being a mere container into which ideas of many sorts can be poured, is itself a potent instrument (a "hidden curriculum") for socializing children to a particular life style. In this light, since it seems difficult to conceive of continuing, purposive social activity bereft of structure, the notion of an unbiased education seems equally difficult to conceive. Some life style must be maintained in any school, but every life style is odious and threatening from some cultural and ideological standpoints.

Several scholars are charging that public schools in the United States have been seriously biased from their inception, despite the carefully nurtured myth of neutrality.[29] (Nonpublic schools also have been far from neutral.) As one manifestation of this bias, the homogeneous approach to instruction that programmatic state controls encourage, as we noted earlier, may deny many children the special programs their cultural backgrounds demand, and thus may rob these children of equal opportunity, withholding the very prerequisites of autonomy that were invoked to justify the controls. Also, this treat-everyone-the-same approach is a threat to minority cultures themselves.

On the basis of the foregoing analysis, we are forced to conclude that the ideal of the neutral educational forum, being unattainable by any means now discernible, can hardly be used to justify programmatic controls. There is no neutral school. If it could be demonstrated that some schools, even if not neutral, were much more conducive than other schools to the development of individual autonomy, we might be able to construct a somewhat plausible case for channelling children into the former schools rather than the latter, but we can discern no reliable criteria for making such distinctions among schools. What many people consider a close approach to neutrality may turn out, on closer analysis, to close off important options, and what many people consider unusually confining approaches to education may have a surprisingly liberating effect. Pertinent here is the fact that graduates of Amish schools seem to move readily into mainstream society when they decide to do so, whereas the public high school appears to create a trained incapacity to live as an Old Order Amishman.[30] If all schools lack neutrality, we are forced to choose between the indoctrinating potential of state programmatic controls and the indoctrinating potential of schools operated by citizen groups of various shades of opinion and life style. Of the two potential tyrannies, surely the tyranny of the small community is far less lethal, since its impact will be limited in a media-pervaded society such as ours. But our history books reek with the human anguish produced by government intrusions on liberty.

Consequently, if a state wants to approach neutrality in the education of its young, the most realistic, humane strategy may be to encourage a great diversity of child rearing approaches, none of them entirely neutral, but all tending to balance each other off in the national dialog to which they contribute. Of course, the state can also urge all schools to decrease bias and to maximize the range of options considered by the young. It is probably feasible to reduce the parochialism of most schools. The question is whether state programmatic controls facilitate or impede progress to that end.

We have criticized as unrealistic the liberal ideal of providing all children with neutral schools. Now we must assess the possibility that attempts to free the student from the biasing impact of all parochialisms--ethnic, religious, national, ideological--are not only unrealistic but counterproductive. The individualistic critical-analytic method that liberal educators have tried for so long to promote is antagonistic to the very emphases upon community, tradition, ritual, and history that may be essential to psychological health and thus--deep irony!--to autonomy and rational decision making for most people. This hostile posture toward tradition, ritual, and community may conceivably contribute to an often-noted anti-historical neglect of the dialog with the past, to an unconcern for human wholeness, and thus to the narrow-minded logic that produces massacres of women and children in the name of national honor, bombings concealed by deceit in the federal executive, and the warped morality of Watergate and the Ellsberg trial.

Strangely, as Fein notes, though it is now widely recognized that participation in a relatively small, cohesive community is essential, for most people, to the development of a sense of identity and the ability to relate humanely to others, the educational implications of that recognition have been left largely unexamined.[31] Obviously, schools cannot simultaneously foster in the student a strong identification with his natal group, and dismantle in the student, on the other hand, the community loyalties and commitments that so many liberals view as impediments to autonomy. Since the liberal ideal of freeing the student from all parochialisms is destructive of community, it may be profoundly counterproductive for most people. The possibility must be entertained, then, contradictory as it may seem, that our society will make more progress toward rationality by encouraging community loyalties than by attempting to destroy them. Even the most insulated of communities (for example, the Amish) have exhibited profound adaptations over time.[32] In a basic sense, no group can escape involvement in our national dialog. The extent to which individuals can be kept ignorant of options in a world so permeated by mass media may be more limited than critics of dissenting groups generally imagine. We should probably be surprised, not that youngsters become aware of options outside their small neighborhoods, but that any cultural diversity survives in the age of the transistor.

Perhaps the most rational interchange of ideas will occur when communities are secure from attacks upon their unique values and when individuals are free from doubt about who they are. Since we can find no way to dismiss these possibilities, we see no cogent way to argue that the state has a right to impose programmatic controls wedded to the liberal ideal of individual autonomy unbiased by community commitment.

b. The Survival of Society

A second major rationale asserts that programmatic controls are indispensible to the preservation of society, and thus to virtually everyone' well being.

It is often asserted that schools must be used--through state compulsion if necessary--to provide all future citizens with a significant body of common experiences and viewpoints, on the theory that this commonality is essential to the preservation of society. One problem here is that no one knows when a society has developed too much commonality for its own good. Furthermore, state officials are probably the last group we should trust to decide how much commonality is essential to the general weal. It is in the interest of these officials to discourage the dissension and diversity that may jeopardize their positions, subject them to challenge, and make public institutions more difficult to govern smoothly. Some efforts to promote unity, in fact, may backfire. We discussed earlier the likelihood that most people in the United States are unable to identify more than superficially with mass society. There is some evidence to suggest that individuals who have developed the secure sense of identity found in purportedly disunifying sub-groups are more capable, not less, of involving themselves in national affairs.[33]

If the state requires schools to promote commonality of viewpoint and experience, some programs must be mandated in schools and some must be outlawed. Otherwise, since the ocean of available materials and styles of learning is so vast, there may be little commonality among the offerings of different schools. Who then should be trusted to decide what all educational programs must hold in common? Whose version of national unity should be enforced upon everyone? To quote the Supreme Court:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As government pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.[34]

This issue is often avoided by means of the fiction that schools simply should emphasize what "all groups have in common."[35] We noted earlier that certain outcomes of education may be considered essential or highly desirable by virtually all citizens in our society, but that these areas of agreement are probably very minimal. Even a cursory look at educational history reveals, however, that the unity the public (and often many nonpublic) schools have sought to promote is neither limited in compass nor composed exclusively of what "all groups have in common."

So pervasive is the domain of common experiences and understandings promoted through state programmatic controls and related policies that some scholars think government has adopted an official "civil religion" and designated the public school as an established church.[36] That religion, such scholars assert, is comprised of the values, beliefs, myths, loyalties, ceremonies, etc., generally subsumed under the rubric, "The American Way of Life." If the "commonality" promoted in schools is a way of life, we may be certain that it is viewed as hostile and repugnant by numerous cultural groups. If it is a religion, or if it performs the essential functions of a religion, the danger arises that it will be as destructive of the liberty of dissenters as any religious establishment. Parents whose child is alienated from them by far-from-neutral schools are not likely to be comforted by the contention that what these schools promote is "not really religion."

Apart from these definitional problems, it seems evident that the unity promoted by state-controlled schools has never been limited to the ideals all groups in our society hold in common. Reactions to the tide of immigration which hit American shores in the late 1800's and early 1900's made this state of affairs particularly clear. "Let us now be reminded," Calvin Stowe declared, "that unless we educate our immigrants, they will be our ruin. . . . It is altogether essential to our national strength and peace, if not even to our national existence, that the foreigners who settle on our soil should cease to be Europeans and become Americans."[37] The intent of "Americanization" was clear, at least in the minds of many influentials: the dominance of Anglo-Saxon culture.[38] Diversity, ethnic and religious, was characterized as a "problem that needed to be obliterated. At times the significant WASPish Americanization thrust was challenged, but not with much discernible success--at least until very recently.

Lately, a reawakening self-consciousness among ethnic groups has prompted bitter protests concerning the purportedly neutral unity the schools have been promoting.[39] Adding to the chorus of dissent have been many people who grew up from birth in the "good life" that the officially promoted "unity" represents, only to reject its most fundamental values! And in the wake of Vietnam, unauthorized bombings in Cambodia, Watergate, the ecology movement, and various "counter-cultural" developments, it now seems clear that the officially defined "commonality" around which all groups in our society join hands in the schools is largely a facade.

We have returned, obviously, to a theme discussed earlier. In a previous passage, we documented the non-neutrality of schools which the states, under the pretense of developing individual autonomy, compel children to attend. Now we conclude that the states, while purporting to accentuate only the values all groups in our society hold in common, use programmatic controls to promote a distinctly biased version of national unity.

We have no argument, as earlier passages have indicated, with the contention that the nation's youth must be given a basic understanding of society's vital institutions (political, economic, legal, etc.), as a prerequisite for responsible participation in democratic processes. We have demonstrated, however, that programmatic controls are not essential to the achievement of these ends. As for the more sweeping insistence that children must be forced by law into institutions that will inculcate devotion to our political system, the idea deserves rejection, both because it demands indoctrination in whatever ideals are officially held as good at a particular time, and because it is unrealistic. To repeat a previous argument, to demand a free press while permitting the state to control another, equally vital, marketplace of ideas seems inconsistent in the extreme.

In chapter 2 we presented a review of the research on children's "political socialization," concluding that schools have little impact on children's patriotism or other political attitudes, no matter how much state officials may wish to use education for such purposes, outlawing all programs that do not attempt to promote attachment to the institutions of our society. But though schools do not seem to have much power of indoctrination, at least for the majority of children, they do appear capable, when working at cross-purposes with home and community, to wreak psychological havoc in the child, and consequently, to disrupt cohesive communties over a period of time. In some respects, ironically, it seems that schools have more potential to cause harm than to work the good that state controls are purported to guarantee.

Finally, let us consider the assertion that society cannot survive unless schools inculcate, through the hidden curriculum or other means, the habits and attitudes without which modern organizations could not exist. The problem here is that we can find merely assertions, but no firm evidence. Different scholars present different definitions of the capabilities that are allegedly essential. Furthermore, over a period of generations, exceedingly complex organizations have been built and manned by people whose schooling was very minimal and sometimes most primitive in nature. As the forces of automation spread, it cannot be assumed that the characteristics which make organizational life possible today will do so tomorrow. If we grant the state the right to impose programmatic controls to promote the competencies "needed" in a complex society, then, we are in effect granting the state the right to make arbitrary decisions about what are the needed competencies.

We have analyzed the state's responsibility to promote the development of autonomy in the young and to preserve the social framework that is essential to virtually everyone's autonomy and happiness. We have been unable to identify any compelling rationale for programmatic state controls. But controls as pervasive as these can hardly be accidental. In chapter three, consequently, we examined what may be some "latent" or "hidden" functions of programmatic state controls in education. For the purposes of this summary, we will merely list several of them, without significant discussion or documentation:

1. Since many programmatic controls in education are more firmly linked to the self-interests of organized professional educators than to any demonstrated social need, some scholars view these controls largely as a manifestation of the current "tyranny of the expert." Efforts by educators to improve their own status and security through programmatic controls may have been significantly abetted by other factors mentioned in this list.
2. The precedent for many programmatic controls was established at a time when there was widespread fear that incoming hordes of immigrants would destroy national unity, Balkanizing the United States into a collection of foreign enclaves.
3. During the municipal reform movement early in the present century, the idea was widely promoted and accepted that the only way to escape the political corruption of the times was to entrust major social institutions to the care of experts. In education, the ideology was firmly established that only "qualified professionals" should prescribe instruction programs for children.
4. The widely promoted ideals of a liberal education, as we have seen, were interpreted to mean that giving parents

and small communities much control over education would destroy the autonomy-promoting "neutrality" of schools.

5. Since relatively powerless, often rather silent minorities (such as the Amish) were virtually the only groups recognizing (until recently) the liberty-destroying potential of programmatic controls, the proponents of these controls had little significant resistance to overcome. Roman Catholics were a major exception in this regard, but they were preoccupied with religious prejudice of a particular kind. Once the public schools ceased to be militantly Protestant, most Catholics apparently assumed that general neutrality had been achieved.

6. Since schools have been notoriously ineffective instruments of indoctrination thus far (with the exception of the apparent power, mentioned earlier, to wreak havoc on minorities not caught up in the cultural mainstream), the coercive potential of programmatic controls has not yet been widely recognized. Furthermore, though the principle is widely accepted that the state may go very far indeed in dictating the educational experiences to which all children must be exposed, state legislatures and administrative agencies have thus far exercised restraint, though blatant violations of liberty have occurred from time to time (e.g., in the case of the Jehovah's Witnesses and the Old Order Amish). But in the future, if educators learn how to construct more powerful instructional systems, and if the states intensify their programmatic grip on schools, liberty may be threatened much more obviously.

To a major extent, then, programmatic controls in education may be viewed as a historical accident. But conditions in our society have changed so drastically that the assumptions involved in those controls may be anachronistic in the extreme. The fact seems difficult to escape that our society is rather seriously threatened by disunity at the present time. But the apparent causes of the disunity, such as political corruption and inequality rendered transparent by the mass media, are hardly factors the schools can be expected to influence, at least by means of a continuing thrust toward commonality of viewpoint. In fact, it can be argued that a preoccupation with unity has helped produce the cultural biases and program homogeneity in the schools that are at least partially responsible for inequality and, ultimately, the disunity that inequality produces in the electronic age. In addition, we seem to have paid far too little attention to the influence of the mass media--now unprecedented in pervasiveness and impact--as perhaps a virtually overwhelming instrument for providing our citizens with a background of common experience. Perhaps adequate analysis of this phenomenon would lead to the conclusion that such forces as child socialization should be marshalled as much as possible in favor of the opposite pole, lest we soon bid goodbye to the last vestiges of some types of diversity we should treasure the most.

For the many reasons discussed in this lengthy summary, we are inclined to conclude that the states in this Union should now take steps toward abandonment of programmatic controls,somewhat as accrediting associations for higher education, under attack for their traditional rigidity, have been doing for years.[40] We see no way of reconciling this nation's basic democratic principles with the now-pervasive role of the state as Super-Parent.

Implications for Illinois and Its Nonpublic Schools

Illinois appears to exhibit one of the nation's most favorable climates for educational experimentation and diversity. The state's Office of Superintendent of Public Instruction (OSPI) has taken numerous steps to encourage the development of "alternative schools" within public school systems. Reportedly, the Superintendent of Public Instruction told an audience of local school superintendents during the last week of September, 1973, that he favored return of more curriculum control to local districts and was considering state educational regulations that might well be eliminated in the future.

So far as nonpublic schools are concerned, the reputation of the State of Illinois for widely influential experimentation extends several decades into the past. In his definitive history of the Progressive Era, Cremin described one Illinois nonpublic school (the Laboratory School at the University of Chicago) as "the most interesting experimental venture in American education."[41] "Indeed," he observed, "there are those who insist that there has been nothing since to match it in excitement, quality, and contribution."[42] At the present time, numerous nonpublic schools in the state are engaged in trailblazing that could have a national impact, including (to cite just a few examples) CAM Academy, St. Mary's Center for Learning, the Southern School, and the Van Gorder-Walden School. It appears that Illinois is the only state with significant Amish settlements that has not harassed the Plain People over their unconventional educational programs. It is one of the few states whose courts have upheld home instruction as a valid substitute, when well executed, for compulsory school attendance. And as Elson points out in chapter 4 of this report, programmatic controls for nonpublic schools in Illinois are among the most minimal in the nation today.

There are numerous indications, however, that Illinois officials are considering the imposition of additional programmatic controls on nonpublic schools. In the OSPI document from which numerous examples of these controls were taken toward the beginning of this chapter, the type of school apparently to be affected by the projected regulatory program is defined as "public, private, and parochial." The Illinois Advisory Committee on Nonpublic Schools, the sponsor of the present study, reports a distinct impression that OSPI is weighing new policies of regulation for nonpublic schools in the state. Apparently

OSPI has declared a moratorium on the "recognition" of new nonpublic schools because it intends to shift its relevant policies. The state's new board of education has been given vaguely defined purview over nonpublic schools.

No doubt deliberations under way in Springfield in this regard are well intentioned. But with all due respect, and particularly in the light of the state's proud tradition of educational freedom and diversity, we think that any move toward intensifying or extending controls over nonpublic schools at this point would be a grievous error, especially if the new thrust is programmatic. The effect might well be to make the state's nonpublic schools worse, not better. For the many reasons discussed earlier, we think the discretion students, parents, and educators seek to exercise in educational settings is far too vital to individual liberty, cultural diversity, and essential experimentation to be infringed upon unnecessarily. Later in this chapter, we will take the liberty of suggesting to state officials an alternative strategy for improving nonpublic education, a strategy which could mark Illinois as the most enlightened, forward-looking state in the nation, so far as these vital issues are concerned.

If elementary and secondary education were fertile territory for get-rich-quick entrepreneurs, or if many parents were complaining of shoddy treatment in nonpublic schools, we could readily understand why more onerous controls are being considered--if indeed they are. (Trade schools are obviously another matter.) But severe fiscal difficulties and enrollment declines in Illinois nonpublic schools have been documented extensively.[43] Efforts in the state legislature to provide financial relief have been struck down by the courts, even so far as indirect benefits widely available in other states are concerned. As a long-time serious student of nonpublic schools, the author has encountered not a single "fast-buck" institution among these schools in Illinois, but many examples of teachers and patrons who are keeping experimental schools alive at great sacrifice, and numerous instances of promising, badly needed schools that have floundered because patrons, personnel, and supporters could no longer sustain the necessary physical and fiscal effort. If Illinois is looking for neglectful parents and teachers to regulate, almost any educator in the state could suggest more likely areas in which to find them.

It should be recognized furthermore, that two significant regulatory safeguards are already operative in the state's nonpublic schools. Since each school involves several (or many) families who participate voluntarily, it necessarily represents a process of consensus, in case the state is concerned about the possibility that individual families may subject their children to educational extremes.[44] In addition, the state may assume that the viewpoints and competencies of professional educators are reflected in the programs. (The author knows of no exception to this tendency.) There is a marked trend, in fact, for new educational ventures in the nonpublic sector to be designed and promoted by teachers and administrators who decide, after years of experience in conventional schools, that there must be a better way to educate children. In some respects, these individuals are in a better position to advise state officials than to be regulated by them.

The time could come, of course, when the need for state regulation of nonpublic schools would be evident in Illinois. Such a situation could occur, for instance, if for reasons as yet not discernible these schools obtained access to abundant fiscal resources. At that point, no doubt, some people would enter the field with the intention of battening on the available largesse. With clear evidence in hand that such a problem existed, the state might logically consider two responses:

First, the state might demand that all schools, public and nonpublic, give evidence (by means of tests, etc.) that they are producing the understandings and skills that are demonstrably essential to responsible adulthood. A program of this kind should be based upon extensive discussion and study, however, to ensure that state officials are not arbitrarily defining what are the indispensable understandings and skills, and to ensure that the testing program is not biased against experimental programs for the development of those competencies. We should reemphasize, furthermore, that we have been able to find no valid reason why the state should be permitted to require schools to produce outcomes that are not almost universally regarded as essential.

Second, the state could rightfully respond to some future demonstrated need for new controls over nonpublic schools by instituting certain "regulated market" mechanisms to keep schools honest and informative toward their patrons and to provide ready avenues of redress for aggrieved students and parents.[45] There is room to suspect that, if given systematic findings concerning the effectiveness of schools in achieving self-stated goals, parents will be far more rigorous than any state agency in demanding excellence.[46] If a parent discovers he is paying for services inferior to those available elsewhere for the same money, action is likely to follow.

Representatives of each type of nonpublic school in the state should participate with state officials and consulting scholars in deciding what information all schools should provide to parents. In the case of Amish schools, for example, data might be published regularly concerning the accomplishments of the graduates in Old Order communities and elsewhere. What handicaps do these graduates feel? What successes have they experienced as farmers and housewives? What do they believe their school should have done for them that it did not do? The results of achievement tests in the basic skill subjects should probably be included. In the case of "prep schools," comprehensive evidence should be made available concerning the colleges to which alumni gain admission and the success of these alumni in subsequent studies. Remedial schools should be required to produce data concerning the results they attain with students having specified problems. Catholic, Lutheran, and Seventh Day Adventist schools might systematically compile facts of the type Greeley and Rossi gathered in their national study.[47]

Christopher Jencks and his colleagues suggest that all schools should provide clients with budgetary information, that the physical facilities available for various purposes deemed important by the school and its patrons should be described accurately, and that the qualifications of teachers (not necessarily in terms of typical certification standards, we would hope) should be listed.[48] The Jencks group makes the telling point, furthermore, that no school failing to provide parents with adequate information deserves to be called "public." From this viewpoint, thousands of publicly financed schools are distinctly private at the present time, run much like closed corporations, while many privately financed schools are distinctly public.[49]

As one possible strategy, the state could publish a handbook, chiefly for the use of parents, providing evidence from each school, public and nonpublic, on the success it is achieving with the type of student it enrolls and toward the goals it avows. On a scientific sampling basis, public officers could audit the materials as a means of ensuring their accuracy. All this could be done without interfering with the diverse objectives and methods of different schools.

Along with the information-disseminating mechanism, the state could, as we have already noted, develop readily available avenues through which students and parents could seek redress of grievances. Several relevant ideas are presented by Elson in chapter 4 of this study, by the Jencks group in its report on Education Vouchers, and in model state legislation recently drafted by a task force of the Education Commission of the States.[50] All these sources should be examined, but above all there should be extensive consultation to ensure that regulations introduced in Illinois will be carefully fitted to conditions existing in the state at the time.

There are those who will argue, of course, that even the two above-mentioned regulatory approaches (testing for clearly essential competencies and maintaining a regulated open market in education) are not enough, since some schools functioning within this framework may still find ways of victimizing their patrons, and some groups of parents may still subject their young to pedagogical extremes. As the director of a current study of accreditation of post-secondary institutions aptly observes, "Those who seek to evade and exploit government regulations and private standards are as astute and diligent as, and more fast-footed than, those who seek to enforce them."[51] But realistically, the most we can ask is that "planners, social scientist, legislators, or administrators . . . acknowledge, and try to remedy, the most grievous and inevitable consequences."[52] If we insist upon attempting to devise a foolproof regulatory system, we may obliterate virtually all opportunity for the unusual educational experiments that are needed to advance the field, may drastically curtail basic liberties, and may still be confronted with bad schools and evasive individuals. (Anyone who thinks current programmatic controls represent a good way to guarantee a high quality of education either is easily misled or has failed to visit many schools.) As the Supreme Court once asserted: "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."[53]

We noted in chapter 2, however, that New Mexico has exempted the members of a regional association (for all practical purposes an accrediting association) of nonpublic schools from most of the state's programmatic controls, but refuses to grant similar liberty to individual schools, or even to local or state-wide associations. New Mexico's theory is that local and statewide associations are too susceptible to extreme ideas in education, while regional and national groups are more likely to be protected from these extremes through the broadly based consensus that they need to operate. In the light of evidence examined earlier concerning the serious dearth of radical experimentation in American schools, we consider this position educationally unsound. Furthermore, when required at broader and broader levels, consensus guarantees that the final product will be less and less closely adapted to the needs and interests of individual families and thus more and more destructive of freedom.

The concept of requiring that the insights of competent educators be reflected in school programs also is amenable to misapplication. As numerous scholars have pointed out in great detail, the criteria by which most states define the competence of educators are often ridiculous, as when an Einstein is defined as incapable of teaching high school mathematics or when administrators are required to amass course credits that may reflect a trained incapacity to perform well. Another misapplication of the principle of requiring professional judgments to be reflected in child-rearing programs is the common practice of having state legislators write into law, or having state administrative agencies draft into regulations, whatever programmatic guidelines for schools professional organizations of educators consider warranted. As we have pointed out, no firm empirical basis yet exists for demonstrating what these guidelines should be, even if it could be assumed (as clearly it cannot) that all groups in our society must pursue the same official version of the good life. What we are most likely to end up with, then, is the type of regulatory system so prevalent in education today--a system that promotes the status and security of the educational profession, but has little demonstrable relationship to instructional quality. If the basic guidelines of child-rearing programs are designed, not through state legislatures and bureaus, which professional associations may be expected to influence profoundly, but by competent individual educators acting in concert with parents, less professional self-aggrandizement and more adaptation of programs to the diverse needs of children seems likely to result. In additon, there will be less opportunity for state officials to use readily available regulatory systems in an effort to indoctrinate and stamp out dissent.

It is probably obvious by now that we think Illinois should begin at once to abandon its existing programmatic regulations for nonpublic schools. We could cite numerous examples of promising innovations inhibited by the state's vague yet bothersome requirement that nonpublic schools offer specified subjects of study and generally be "equivalent" to public schools. But we would rather suggest to the state, partly because we applaud the enlightened leadership its officials have demonstrated thus far, a positive policy that could have profound international impact. Our proposal is that all nonpublic schools in Illinois that will cooperate in a far-reaching longitudinal experiment, to be described in general terms below, be offered, in return for the cooperation, complete freedom from all existing programmatic controls in the state. As an essential part of the experiment, participating schools could be required to gather systematic information (by means of the best methods leading scholars can identify) concerning a wide range of educational outcomes (especially the outcomes that these schools particularly espouse), concerning any innovations that occur, and concerning the reactions of parents and other interested persons during the course of the experiment. To avoid running afoul of current constitutional rulings concerning aid to church-related schools, the state should pay only the actual costs of gathering the data it needs to advance our knowledge of instructional and organizational relationships in education. The participating schools should be allocated randomly to several groups. One group should be excused, for the five years or so during which the experiment operates, from all state controls, programmatic or nonprogrammatic, except health, safety, and applicable civil rights regulations. Each of the other participating school groups should be subjected to a different version of the "regulated market" system discussed earlier. One or two of these versions should involve positive encouragement by the state of programs that depart significantly from the beaten path, in terms of needs that representatives of nonpublic schools in Illinois (perhaps the members of the Illinois Advisory Committee on Nonpublic Schools) are in a good position to identify. There may be some need, for example, for state intervention in the case of unconventional schools that are harassed by local authorities through arbitrary enforcement of local ordinances and other obstructive devices. The assistance of first-rank experts on research design should be obtained in an effort to compensate for the problems that "reforms as experiments" inevitably pose.[54] We are convinced that a venture of this kind could produce unprecedented information concerning the types of information parents are most likely to use well when selecting educational programs for their children, and concerning other effects of several approaches to the nonprogrammatic regulation of nonpublic schools. The resultant findings could easily illuminate the issue of how to make public as well as nonpublic schools more accountable to their constituencies.

More generally, John Elson has discussed in chapter 4 several procedural safeguards that the state should probably utilize, especially in the light of recent developments in Springfield. Prominent among these is the policy, already in use in Illinois but probably warranting elaboration, of consulting extensively with representatives of nonpublic schools concerning proposed state policies that affect their interests.

Even apart from what the state may do, several steps may deserve consideration by nonpublic schools in Illinois. As Elson forcefully demonstrates in chapter 4, no legal procedures can compensate fully for misinformation and distrust. We have observed that important safeguards are by necessity reflected in the operation of nonpublic schools in Illinois, particularly during this era of fiscal emergencies and enrollment declines. But both state officials and common citizens seem (a) unaware of these, (b) unaware of the information and attention to complaints that patrons of nonpublic schools generally demand (since their patronage is voluntary) and (c) unaware of the variegated problems and accomplishments of nonpublic schools.

One encounters widespread misunderstanding of the ways in which nonpublic schools are organized and operated--including, for example, the idea that Catholic schools (which scholars often characterize as a "non-system") are highly centralized, governed by the Vatican, some national office, or even the local bishop. While it does not seem advisable at this time for the Illinois Advisory Committee on Nonpublic Schools (IACNS) to constitute itself as an accrediting agency and to seek recognition as such from state and federal officials, IACNS might well map out the road that leads to the accreditation function (in case that strategy should ever become essential in the effort to ward off programmatic controls), and to take some of the first steps in that direction without committing itself further. Those first steps, perhaps warranted by the current situation, might include some of the following:

IACNS could articulate and publicize the information-giving, complaint-processing, and other patron-protecting mechanisms that its member schools maintain. It could study ways of improving these procedures. It could provide its own avenue of appeal and redress for parents and students who believe they have not been treated equitably by its member schools. It could investigate serious allegations of this type and assure the public that it will strike from its membership list any schools that do not live up to its ethical standards. In addition, IACNS could consider possible ways of facilitating individual and collective self-studies and external evaluations on the part of its members. Important assistance in this regard is available from the recent work of several accrediting agencies, which have been attempting to devise evaluative procedures that do not inhibit radical departures from conventionality.[55] Further ideas may soon be accessible from several current studies of accreditation.[56] The existence of a self-policing organization of nonpublic schools might provide a reasonable alternative on those occasions when a state might otherwise be forced to utilize its own procedures of school "recognition" or "approval" in connection with state or federal benefits that can be made available only through some mechanism that differentiates, at least ostensibly, between the "more reliable" and "less reliable" schools.

As perhaps the most important step of all, IACNS could maintain a systematic effort to acquaint state officials and the general public with their special educational objectives, with the frequently surprising diversity of students they serve, with their fascinating history and traditions, with their difficulties, with their dreams, and with their demonstrable accomplishments. Schools seem more likely to accomplish this formidable task collectively than individually.

Broader Implications

While the comments in the preceding passage are addressed to Illinois and its nonpublic schools, virtually the same implications apply elsewhere, though in many states the need for regulatory reform affecting nonpublic schools is much more urgent than it is in Illinois.

But our concern should extend beyond the nonpublic schools. Public school teachers and adminstrators often exhibit justifiable resentment when one argues for special freedom to experiment in nonpublic schools. Public educators frequently are frustrated by demands imposed by the state and the agencies it empowers to act in its behalf. We feel obliged to suggest, then, even if very sketchily, some ways of loosening the state's standardizing grip in the public schools.

We applaud the efforts of the Illinois Superintendent of Public Instruction to diminish the state's prescriptions concerning the curriculum and other phases of public school operation, thus permitting more discretion at the local level. His encouragement of "alternative schools" within public school systems establishes another important principle that should be extended. If alternative schools are desirable as a way of matching programs to differential student needs and interests, why not alternatives smaller in scope than a total school, and why not alternative learning experiences outside school? We see no good reason, as we mentioned in chapter 1, why public school authorities at virtually all levels (from the classroom to the state department) should not be required to entertain proposals made by students, parents, and educators as individuals, small groups, or larger collectivities--proposals to substitute various learning opportunities, conventional or unconventional, inside or outside school walls, for programs the state customarily requires. Within such a framework of freedom, we would seldom encounter examples, as we often do today, of potential Chopins who must leave their pianos to participate in what is for them an inane classroom discussion of baroque music, of Olympic skating champions whose high school graduation diplomas are held up for lack of physical education credits, and of many other children who could learn inestimably more of what is important and useful to them in settings that the law now makes generally inaccessible during the prolonged periods of compulsory school attendance.

Proposals for activities to be accepted in liew of generally required programs could be evaluated in terms of clearly stated standards of reasonableness. As a safeguard against too-conventional rulings, the state could permit students, parents, and teachers whose proposals were rejected to appeal to a panel composed of people of acknowledged breadth and integrity, drawn largely from outside the "educational establishment."

We are inclined to believe, however, that one major linchpin of programmatic controls is the long-standing practice of requiring schools to free parents from child-care responsibilities for extended periods of time and to keep the young off the streets and the job market. The idea of abandoning compulsive mechanisms in education may be frightening to many people because it conjures multitudes of children and adolescents turned loose with their energies unharnessed. We tend to agree with Bereiter, however, that the custodial function is a major impediment to school effectiveness.[57] In many inner cities, if schools could concentrate their resources in an all-out effort to develop the basic communicative skills during the first few years of instruction, releasing youngsters as soon as success had been achieved, a much higher average level of achievement might be produced with much less money. Baby-sitters need not be professional educators. Current arrangements require, instead, that available funds for a child's schooling be dissipated to a significant extent in an effort to keep the youngster corralled and controlled for a period as close as possible to twelve years. It seems surprising that so few questions have been asked about the right of the state to insist that children be held in custody in schools so fewer complications will arise in homes, streets, and job markets. Since the courts are beginning to develop the doctrine that children have essentially the same civil rights as adults, surely we will soon confront the question of why children may be kept in custody without due process of law, simply to facilitate certain social processes, while adults may move about freely.

It will be difficult to develop ways of relieving schools of the custodial function. Reimer proposes that we allocate child-care functions to other institutions by making major parts of the city safe for children to roam and explore, by sending many boys and girls to rural areas for extended periods, by developing universally available child-care centers, and by utilizing new apprenticeship programs.[58] Since the possibility of relieving schools of the responsibility that jails assume for adults has received so little attention, few promising possibilities have yet been identified. But the question deserves sustained attention. If there were no need to wonder, for example, about what problems adolescents could cause if not cooped up five days a week, it might make eminent sense to abolish compulsory attendance during the adolescent years and to use the resources thus saved on the early development of essential skills and on later educational opportunities made available on a lifelong basis. Young people who respond well to classroom instruction could remain in classrooms. Those who do not could indulge their interests elsewhere, often with much better results than are now achieved. The state would not be forcing individuals into culturally and ideologically biased schools during the years when influences outside the home have their most powerful impact. And people who elect, during adolescence or early adulthood, to abandon some parochial life style could enter a nearby educational way station at any time to acquire the competencies they require in the wider world. Changes in occupation and way of life are becoming an accepted, frequently encountered phenomenon, and the trend seems certain to intensify. Large numbers of citizens--not just a few people from dissenting subcultures--will require periodic retraining. The notion that education is something provided in classrooms primarily for children is surely antiquated, due to be replaced by a system of educational opportunities made available to all citizens continuously, in many settings and through many media. The advent of the "learning society" may turn out to be the ultimate demise of state programmatic controls in education.

We should emphasize in closing that we do not contend, along with many radical critics today, that schools are necessarily bad places for children and other living things, that the majority of the young do not respond reasonably well to fairly conventional pedagogical approaches, or that most people in the United States find repugnant the values most schools promote. Our concern is for the sizeable minorities who find the way of life perpetuated in mainstream schools foreign and alienative, for the many children who learn best in unconventional ways, and for the radical experiments that seem essential to educational progress. Our sympathies are with all students, parents, and educators who prefer child-rearing practices outlawed or severely inhibited by a state that has acquired, in a society built on libertarian principles, the prerogatives of a Super-Parent.

Notes to Chapter 5

1. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), at 483-84.

2. *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), at 603-04.

3. In his reanalysis of historical data in England and New York, E. G. West concludes that compulsory attendance laws were unnecessary in the light of the efforts parents were already making to educate their children, and that these laws may even have *reduced* the supply of schooling. See E. G. West, "The Political Economy of American Public School Legislation," *Journal of Law and Economics* 10 (Oct., 1967), 101-128; and his *Education and the State* (London: Institute of Economic Affairs, 1965).

4. See chapter 4, p. 4/34.

5. *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972).

6. Donald A. Erickson, "The Plain People vs. the Common Schools," *Saturday Review* 49 (Nov. 19, 1966), pp. 85-87, 102-103; "The 'Plain People' and American Democracy," *Commentary* 45 (Jan., 1968), 36-44; "The Persecution of LeRoy Garber," *School Review* 78 (Nov., 1969), 81-90.

7. Office of the Superintendent of Public Instruction, "The Illinois Program for Evaluation, Supervision, and Recognition of Schools" (Circular Series A, No. 160; Springfield, Ill.: the Office, 1973, offset).

8. Edwin M. Bridges and Melany E. Baehr, "The Future of Administrator Selection Procedures," *Administrator's Notebook*, Vol. 19 (January, 1971).

9. When the child attends a public school, the costs are taken out of tax revenues, but when the child attends a nonpublic school, the costs must be provided through private investment (usually on the part of the parent), even though the parent must continue to pay his share of the tax bill for public education.

10. Donald A. Erickson, "Freedom's Two Educational Imperatives: A Proposal," in Donald A. Erickson, ed., *Public Controls for Nonpublic Schools* (Chicago: University of Chicago Press, 1969), p. 164; and E. G. West, "The Economics of Compulsory Education" (pre-publication manuscript, 1972).

11. Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), pp. 85-107; John E. Coons, William H. Clune III, and Stephen D. Sugarman, *Private Wealth and Public*

Education (Cambridge: Belknap Press of Harvard University Press, 1970), esp. chapter 6; Charles S. Benson, "Economic Analysis of Institutional Alternatives for Providing Education (Private, Public Sector)," in Roe L. Johns et al., eds., *Economic Factors Affecting the Financing of Education*, National Educational Finance Project, Vol. 2 (Gainesville, Fla., the Project, 1970), pp. 121-172.

12. Robert Glaser, "Individuals and Learning: the New Aptitudes," *Educational Researcher* 1 (June, 1972), 5-13.

13. Eric A. Hanushek and John F. Kain, "On the Value of *Equality of Educational Opportunity* as a Guide to Public Policy," in Frederick Mosteller and Daniel P. Moynihan, eds., *On Equality of Educational Opportunity* (New York: Random House, 1972), pp. 116-145.

14. Rosalie Wax, "The Warrior Dropouts," *Transaction*, May, 1967, pp. 40-46.

15. *Wisconsin* v. *Yoder*, *supra*, note 5.

16. Robert M. Hutchins, "The Constitution of Public Education," *Center Magazine* 2 (July, 1969), 8.

17. *Ibid*.

18. C. Arnold Anderson, "State Education and Cultural Alienation" (pre-publication manuscript, University of Chicago, 1969).

19. James M. Redfield, "Platonic Education," in Wayne C. Booth, ed., *The Knowledge Most Worth Having* (Chicago: University of Chicago Press, 1967), p. 154.

20. Another conceivable exception, explored later, involves the possibility that, whereas few demonstrably essential understandings and skills can be identified, exposing children to a wide range of common experiences (however arbitrarily these experiences may be selected) is essential to the minimal unity without which no society can survive.

21. Robert Dreeben, *On What Is Learned in School* (Reading, Mass.: Addison-Wesley Publishing Co., 1968).

22. Erickson, "The Plain People vs. the Common Schools"; "The 'Plain People' and American Democracy"; "The Persecution of LeRoy Garber."

23. See, for example, Kenneth M. Dolbeare and Phillip E. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (Chicago: University of Chicago Press, 1973); Donald R. Reich, "The Supreme Court and Public Policy: The School Prayer Cases," *Phi Delta Kappan* 58 (September, 1966), 29-32; Elia Katz. "Patterns of Compliance with the Schempp Decision," *Journal of Public Law* 14 (1965); William G. Howard, "Florida Schools Ignore Ban on Bible Reading," *Nation's Schools* 79 (May, 1967), 122; William K. Muir, Jr., *Prayer in the Public Schools: Law and Attitude Change* (Chicago: University of Chicago Press, 1967); Arthur Gilbert, "Reactions and Resources," in Theodore R. Sizer, ed., *Religion and Public Education* (Boston: Houghton Mifflin Company, 1967), pp. 37-83; Donald A. Giannella, ed., *Religion and the Public Order*, 1964 (Chicago: University of Chicago Press, 1965), pp. 243-352; Theodore Powell, "The Dangers of Liberty," in Sizer. *Religion and Public Education*, p. 140.

24. Jules Henry, "Is Education Possible?" in Erickson, ed., *Public Controls*, pp. 25-102.

25. Newton Edwards and Herman G. Richey, *The School in the American Social Order* (2d ed.; Boston: Houghton Mifflin, 1963).

26. Marshall D. Herron, "The Nature of Scientific Inquiry," *School Review* 79 (Feb. 1971), 171-212; Byron G. Massialas, Nancy Freetag Sprague, and Jo Ann Sweeney, "Traditional Schools, Parochial Pedagogy," *School Review* 79 (Aug., 1971), 561-78.

27. James S. Coleman, *The Adolescent Society* (Glencoe: The Free Press of Glencoe, 1961).

28. Bernard C. Rosen, "Conflicting Group Membership: A Study of Parent-Peer Cross-Pressures," *American Sociological Review* 20 (April, 1955), pp. 155-161; Morris Rosenberg, "The Dissonant Religious Context and Emotional Disturbance," in Louis Schneider, ed., *Religion, Culture, and Society: A Reader in the Sociology of Religion* (New York: John Wiley & Sons, 1964), pp. 549-559; Benjamin S. Bloom, "Stability and Change in Human Characteristics: Implications for School Reorganization," *Educational Administration Quarterly* 2 (Winter, 1966), 46.

29. Herbert Gintis, "Towards a Political Economy of Education: A Radical Review of Ivan Illich's *Deschooling Society*," *Harvard Educational Review* 42 (Feb., 1972), 87-88; James Steve Counelis, "The American Curriculum and Intellectual Religious Liberty," *Orthodox Observer* 30 (May, 1964), 145-46; Annie Stein, "Strategies for Failure," *Harvard Educational Review* 41 (May, 1971), 158-204; Michael B. Katz, *Class, Bureaucracy and Schools* (New York: Praeger, 1972); Colin Greer, *The Great School Legend* (New York: Basic Books, 1972); Michael Novak, *The Rise of the Unmeltable Ethnics* (New York: Macmillan, 1972).

30. John A. Hostetler, *Amish Society* (rev. ed.; Baltimore: Johns Hopkins Press, 1968).

31. Leonard Fein, "The Limits of Universalism," in Henry J. Levin, ed., *Community Control of Schools* (Washington, D.C.: the Brookings Institution, 1970), pp. 89-90.

32. Hostetler, *Amish Society*.

33. Andrew M. Greeley and Peter H. Rossi, *The Education of Catholic Americans* (Chicago: Aldine Publishing Co., 1966).

34. *West Va. State Bd. of Educ.* v. *Barnette*, 318 U.S. 624 (1943).

35. Justice William O. Douglas, quoted in Robert Michaelsen, *Piety in the Public School* (New York: The Macmillan Company, 1970), p. 58.

36. See, for example: Robert N. Bellah, "Civil Religion in America," *Daedalus* 96 (Winter, 1967), 1-21; Will Herberg, *Protestant, Catholic, Jew* (rev. ed.: Garden City, N.Y.: Anchor Books, 1960); Michaelsen, *Piety in the Public School*.

37. Quoted in David B. Tyack, ed., *Turning Points in American Educational History* (Waltham, Mass.: Blaisdell Publishing Co., 1967), p. 149.

38. Lawrence A. Cremin, *The Transformation of the School* (New York: Vintage Books, 1961), p. 68; Tyack, *Turning Points*, chapter 7; Charles F. Marden and Gladys Mayer, *Minorities in American Society* (2nd ed.: New York: American Book Company, 1942), p. 30.

39. See, for example: Stein, "Strategies for Failure "; Victor G. Cicirelli, "Educational Models for the Disadvantaged," in Herbert J. Walberg and Andrew T. Kopan, eds., *Rethinking Urban Education* (San Francisco: Jossey-Bass, 1972), pp. 31-48; Katz, *Class, Bureaucracy and Schools*; James Herndon, *The Way It Spozed to Be* (New York: Bantam Books, 1969); Jonathan Kozol, *Death at an Early Age* (Boston: Houghton Mifflin Company, 1969); Wax, "The Warrior Dropouts"; Christopher Jencks, "Private Schools for Black Children," *New York Times Magazine*, Nov. 3, 1968; Charles A. Valentine, "Deficit, Difference, and Bicultural Models of Afro-American Behavior," *Harvard Educational Review* 41 (May, 1971), 137-57; Dianna Mack Drake, "Ango American Teachers, Mexican American Students, and Dissonance in Our Schools," *Elementary School Journal* 73 (January, 1973) 207-12.

40. Herbert R. Kells, "Institutional Accreditation: New Forms of Self-Study," *Educational Record*, (Spring, 1972), pp. 143-48.

41. Cremin, *The Transformation of the School*, p. 136.

42. *Ibid*.

43. Donald A. Erickson, *Crisis in Illinois Nonpublic Schools* (Springfield, Ill.: Elementary and Secondary Nonpublic Schools Study Commission, State of Illinois, 1970).

44. Cf. Judith C. Areen, "Alternative Schools: Better Guardians than Family or State?" *School Review*, 81 (February, 1973), 175-93.

45. Erickson, "Freedom's Two Educational Imperatives," pp. 173-74.

46. We think this despite evidence that in some areas of life the availability of new information does not appear to affect consumer behavior, for considerations developed by West (*supra*, note 3) are more directly pertinent. But see G. Day and W. Brandt, *A Study of Consumer Credit Decisions: Implications for Present and Prospective Legislation* (Stanford U., 1972); R. Pullen, "The Impact of Truth-in-Lending Legislation: The Massachusetts Experience" (Research Report No. 43 to Federal Reserve Bank of Boston, Oct. 1968).

47. Greeley and Rossi, *The Education of Catholic Americans*.

48. Center for the Study of Public Policy, *Education Vouchers: A Report on Financing Elementary Education by Grants to Parents*, A Report Prepared under Grant CG 8542 for the U. S. Office of Economic Opportunity (Cambridge, Mass.: Center for the Study of Public Policy, 1970, offset), pp. 65-68.

49. *Ibid*.

50. Task Force on Model State Legislation for Approval of Postsecondary Educational Institutions and Authorization to Grant Degrees, *Model State Legislation* (Denver: Education Commission of the States, 1973).

51. Harold Orlans, "Adventures in Wonderland, or The Blind Men and the Elephant, or The Government and Accrediting" (address at meeting of American Association for Higher Education, Chicago, March 12, 1973), p. 2.

52. *Ibid*.

53. *West Va. State Bd. of Educ.* v. *Barnette*, *supra*, note 34. at 640-41.

54. Donald T. Campbell, "Reforms as Experiments," *American Psychologist* 24 (April, 1969), 409-29.

55. We would particularly recommend for study: Commission on Independent Secondary Schools, New England Association of Schools and Colleges, *Manual for School Evaluation* (Burlington, Mass.: the Association, 1972).

56. A brief overview of relevant studies appears in Appendix A.

57. Carl Bereiter, "Schools Without Education," *Harvard Educational Review* 42 (Aug., 1972), 390-413.

58. Everett Reimer, *School Is Dead* (Garden City, N. Y.: Doubleday & Co., 1971), p. 36.

APPENDIX A

NOTES ON ACCREDITATION*

When the present study began, we became aware that considerable relevant work was under way in the context of criticism of the accrediting of colleges and universities. We made efforts to benefit from these investigations.

In some respects, precollegiate educational institutions seem to lag far behind colleges and universities in challenging programmatic controls as a threat to liberty, experimentation, and diversity. The regional accreditation associations have been attacked so repeatedly and forcefully in this regard that they seem generally to be abandoning evaluative criteria that spell out how an institution must be operated in favor of "asking whether the program. process, or procedure /found in a college or university/ works."[1] The Federation of Regional Accrediting Commissions for Higher Education (FRACHE) has initiated a three-year study, directed by Norman Burns, of new ways of measuring the products, rather than the processes of education. Accrediting agencies also are making attempts to ensure that the clients of institutions of higher education will be provided with honest, adequate information as a basis for deciding what colleges and universities to attend. The Southern Association of Colleges and Schools reportedly has adopted special standards for the accreditation of open university programs,[2] FRACHE, similarly, is exploring new approaches to evaluating unorthodox institutions.[3]

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*The assistance of Bruce S. Cooper in the assembling of materials leading to this appendix is gratefully acknowledged.

We made strenuous attempts to secure information from a number of pertinent projects under way or recently completed. Norman Burns courteously provided an early working draft of the above-mentioned three-year FRACHE study.[4] Harold Orlans gave access to a number of documents from the federally funded investigation, then quartered at Brookings, of "Private Accrediting and Public Funding." We found the papers from Orlans especially helpful. Though Frank Newman of Stanford University had been rather widely quoted in connection with his federal task force on accreditation, we were unable, despite many communications, to obtain any written materials from him, though his final report was reportedly overdue. The Education Commission of the States promptly responded to our inquiries by sending copies of model legislation developed by its Task Force on Model State Legislation for Approval of Postsecondary Educational Institutions and Authorization to Grant Degrees. Ralph C. West send descriptions of work conducted in the aegis of the Commission on Independent Secondary Schools of the New England Association of Schools and Colleges, along with the criteria eventuating from that work. Useful information was obtained concerning the "self-accrediting" efforts of the Montessori Schools in Minnesota, the Pennsylvania Association of Private Academic Schools, and, in Oklahoma and New Mexico, the Southwest Association of Independent Schools. We are grateful to the individuals who provided answers to our questions in these respects.

As it turned out, several important analyses of accreditation at the post-secondary level were as yet incomplete and unreported; so the results of our efforts to benefit from these studies were generally disappointing. In the meantime, however, we think a number of tentative conclusions may be identified for the benefit of groups considering the probable benefits and liabilities of pre-collegiate accreditation procedures:

1. There is apparently successful precedent for this approach.

The Commonwealth of Pennsylvania has accepted membership in the Pennsylvania Association of Private Academic Schools in lieu of compliance with the state's onerous and generally medieval licencing regulations. In Minnesota, schools connected with the Association Montessori Internationale have been granted exemption from the requirements of the state welfare department. In New Mexico, the State Department of Education accepts the evaluative mechanisms of the Southwestern Association of Independent Schools as a substitute for state approval mechanisms, as does the Oklahoma Board of Regents for Higher Education.

2. It may be inherently difficult for accrediting groups to provide adequate scope for innovation and diversity.

Schools that have established their own accrediting association could easily be tempted to use the influence of the association to discourage competition, particularly from institutions that seem distinctly "off-beat." At least this is one plausible explanation for the widespread charge (in higher education) that accrediting associations are hostile toward anything inconventional.

We suspect, however, that an accrediting group seriously intent upon adopting a more open stance could make significant progress to that end. Particular encouragement may be drawn from the work of the Commission on Independent Secondary Schools of the New England Association of Schools and Colleges. The Commissions's Manual for School Evaluation exhibits many commendable features.[5] It is singularly free of programmatic controls.

3. In the long run, it may prove necessary for several accrediting agencies, each serving a distinct group of institutions, to function in each geographic area.

While efforts to broaden the outlook of accrediting groups seem essential, there is probably an unavoidable limit on the range of educational objectives that any single agency can accomodate. To quote Harold Orlans, it may be better that schools excluded by existing accreditors "form new accrediting agencies with standards of their own than that the standards of existing agencies be stretched so far as to become meaningless."[6] In some particulars, at least, it may be a major contribution of accreditors to certify to the public that a school adheres to, and is a reputable respresentative of, a particular educational philosophy. At present, federal agencies exhibit a discouraging (and, we think, unrealistic) habit of recognizing only one accrediting association for a given level of education in a particular geographic area, but perhaps the final reports of several major studies now under way will help produce a modification of that posture.

4. Since accrediting agencies seem to have done such a poor job of informing the public about member institutions and protecting clients against occasional unscrupulous schools, new accrediting groups should recognize the need to exert special effort in this regard.

Orlans points out that the current system of federal recognition of accrediting agencies has permitted enough flagrant fraud to warrant a congressional inquiry. "In more than a few cases, poor, ignorant, or handicapped people who cannot even read English have signed contracts binding them to repay loans for education they never receive; there are cases in which student default rates at individual schools have run so high that local banks have refused to extend further loans, but more distant banks continue to do so; in the District of Columbia, one school has even lost its licence; and yet, because such schools retain their accreditation, they retain their eligibility and the benighted government continues to insure their loans."[7] In reaction, one could argue for the intervention of government. But on the contrary, there may be important steps that an accreditation agency can probably take to protect the public against unscrupulous schools. Numerous strategies for the protection of the consumer are suggested by Elson in chapter 4 and by the Task Force on Model Legislation of the Education Commission of the States.[8]

5. Accreditation mechanisms can be prohibitively expensive for many schools.

The self-studies, team visits, and follow-up work that are typically involved in accreditation can be expensive in monetary terms and enormously costly in terms of staff time and energy, all of which are already stretched thin in many nonpublic schools. An accreditation agency for elementary and secondary schools, unless devised almost primarily for elite, liberally supported institutions, would have to devise imaginative new ways of evaluating its members to avoid overburdening them. Perhaps unaccustomed attention should be given, for example, to the use of statistical sampling techniques, in lieu of the holistic evaluations that are now customary. The problem probably means, furthermore, that no group of nonpublic schools should constitute itself as a full-fledged accrediting association unless that step is clearly warranted.

6. Finally, the distant but distinct possibility should be faced that, in assuming the responsibility of evaluating schools in lieu of state regulation, an accrediting association may be opening the door to the full application of the Fourteenth Amendment and consequently to the curtailment of many freedoms enjoyed by strictly private agencies.

This point is well analyzed by Elson in chapter 4. In assuming functions customarily performed by government, private groups may provide a rationale that permits them to be treated as if they were agencies of the state.

Notes to Appendix A

1. Herbert R. Kells, "Institutional Accreditation: New Forms of Self-Study," Educational Record, Spring, 1972, p. 144.

2. Philip W. Semas, "Accrediting Groups are Accused of Stifling Innovations by Colleges," Chronicle of Higher Education 7 (January 15, 1973), 1.

3. Ibid.

4. Norman Burns, "Institutional Accrediting: A Look Ahead" (mimeographed manuscript, North Central Association of Colleges and Secondary Schools, May, 1973).

5. Commission on Independent Secondary Schools, New England Association of Schools and Colleges, Manual for School Evaluation (Burlington, Mass.: the Association, 1972).

6. Harold Orlans, "Adventures in Wonderland, or The Blind Men and The Elephant, or The Government and Accrediting" (mimeographed manuscript, The Brookings Institutions, Washington, D. C., March, 1972), p. 7.

7. Ibid., p. 10.

8. Task Force on Model Legislation for Approval of Postsecondary Educational Institutions and Authorization to Grant Degrees, Model State Legislation (Report No. 30; Denver: the Commission, 1973).